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FORUM PROROGATUM OR ACCEPTANCE OF A UNILATERAL SUMMONS TO APPEAR BEFORE THE INTERNATIONAL COURT

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THE PRELIMINARY PROCEEDINGS IN THE CORFU CHANNEL CASE

The *Corfu Channel Case* (*Preliminary Objection*) [1] may outwardly seem to have been much ado about nothing, since the parties signed a special agreement submitting the case to the International Court of Justice shortly before the Court dismissed Albania's plea to the jurisdiction. But, in fact, two distinct questions of jurisdiction of considerable importance were involved. Only one of these questions, the *forum prorogatum*, will be investigated in the present paper. A brief statement of the other question and of the course of the preliminary proceedings is, however, necessary for the proper understanding of the application of the principle of *forum prorogatum* in the case. As the phrase *forum prorogatum* may convey little to those who live under the common law, its meaning should perhaps be explained at the outset. It signifies in Roman systems [2] and in international law the establishment of

[1] Case No. 2, 1948 *Reports of the International Court*, p. 15. Very fully reported in Vol. 2, *International Law Quarterly*, p. 68.
[2] Cf. Dig. V. i. 1 and 2; *Encyclopædia of the Laws of Scotland*, Vol. VIII, p. 516.

jurisdiction by voluntary submission of one party, without whose submission the Court is not competent to adjudicate.

The dispute, as is well known, arose out of the mining of two destroyers in the Corfu Channel, and on April 9, 1947, the Security Council,[3] acting under Article 36 (3) of Chapter VI of the Charter, recommended that—

> 'the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court.'

Article 40 (1) of the Statute of the Court provides that 'cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar.' Now, Albania had strenuously resisted in the Security Council the proposal for reference to the Court, asking at the final meeting that it should be categorically rejected. This fact, no doubt, influenced the United Kingdom Government in its decision to proceed by unilateral and not by a special agreement concluded with Albania.

A written application is required by the Statute to indicate the subject of the dispute and the parties, and Article 32 (2) of the Rules of Court further prescribes—

> 'It must also, *as far as possible*, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim etc. . . .'

The United Kingdom's application, filed on May 22, contended that the Court had jurisdiction over the dispute in accordance with Article 36 (1) of its Statute under the head of a matter 'specially provided for in the Charter of the United Nations'. The argument advanced in support of this contention was that—

> (a) Albania, when accepting the invitation of the Security Council under Article 32 of the Charter to participate in its discussions, had agreed to undertake all the obligations of a Member State for the purpose of the dispute;
>
> (b) the Security Council had made a 'decision' when resolving on April 9 to recommend the two governments to refer the dispute to the Court;
>
> (c) Article 25 of the Charter requires Members to accept and carry out the 'decisions' of the Security Council.

In other words, the provision specified by the United Kingdom in its application as founding the jurisdiction of the Court involved the assertion that by reason of Article 25 Albania was subject to

[3] S/P.V. 127, p. 46.

compulsory jurisdiction. If this assertion was correct, no exception could be taken to the procedure by unilateral application.

The application was immediately transmitted to Albania by the Registrar in accordance with the Statute and with Article 33 (1) of the Rules of Court, which directs him to transmit an application forthwith to the other party. Albania, which had not previously taken any overt action in regard to the Security Council's resolution, responded by a letter dated July 2, which reached the Court on July 23. The letter maintained that Article 25 of the Charter relates solely to decisions of the Security Council taken under Chapter VII and has no application to a recommendation made, as in the instant case, under Chapter VI. On this premise, Albania denied that it was subject to compulsory jurisdiction and insisted that the only regular procedure open to the United Kingdom for implementing the Security Council's recommendation was the conclusion of a special agreement with Albania submitting the dispute to the Court jointly. Albania's letter then continued—

> 'It is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court.
>
> Nevertheless, the Albanian Government makes the most explicit reservations respecting the manner in which the Government of the United Kingdom has brought the case before the Court in application of the Council's recommendations and more especially respecting the interpretation which that Government has sought to place on Article 25 of the Charter with reference to the binding character of the Security Council's recommendations. The Albanian Government wishes to emphasise that *its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future.*'

The italicised words led first the Security Council's Membership Committee and then, in turn, the President of the Court, the United Kingdom and the Court itself (only Dr. Daxner, appointed *ad hoc* by Albania, dissenting) to interpret the letter as a voluntary acceptance of jurisdiction by Albania on July 2 for the hearing of the case upon the merits.

Albania's renewed candidature for membership of the United Nations which came before the Membership Committee of the Security Council at meetings on July 21 and 23 had no prospect of success so long as Albania had not complied with the Security Council's recommendation in regard to the Corfu Channel dispute. At these meetings the Committee asked for information on this point, and at the next meeting on July 28 the Secretariat reported the terms of Albania's letter which had been telegraphed by the

Registrar of the Court. The Committee took the letter as an acceptance of the jurisdiction of the Court and as removing that particular obstacle to Albania's membership. Before Albania finally registered its preliminary objection to jurisdiction on December 9, its candidature had, however, been rejected for other reasons connected with the Balkan situation.

The President of the Court appears also to have treated the letter as an acceptance of jurisdiction when he made his first Order in the case on July 31. For, after consulting the Agents of both parties, he directed the United Kingdom to deliver its memorial by October 1 and Albania its counter-memorial by December 10, obviously having in mind pleadings on the merits. If he had thought that the jurisdiction was in issue, the natural procedure would have been for Albania to deliver the first pleading amplifying the grounds of its objection. Equally significant was the fact that the President treated the letter as constituting the document required by Article 36 of the Rules of Court as evidence that a State, not a party to the Statute of the Court, has complied with the conditions laid down by the Security Council for admission to the Court. For the Security Council has legislated that the Court shall only be open to a State, not a party to the Statute, when it has previously deposited a declaration by which it accepts the jurisdiction of the Court.[4]

The United Kingdom, not unnaturally, regarded the Albanian letter, followed by the President's Order, as having put the question of jurisdiction out of the way. It, therefore, limited its memorial to a discussion of the merits. The President's Order could not, however, actually conclude the question of jurisdiction as *res judicata* for two reasons—

(a) Under Article 62 (1) of the Rules of Court a preliminary objection may be filed at any time before the expiry of the date fixed for the delivery of the objecting State's first pleading—in this case December 10, when Albania's counter-memorial was due.

(b) Under Article 37 (5) of the Rules any preliminary order made by the President acting alone is without prejudice to the subsequent decision of the Court.

It is scarcely necessary to point out that neither of these Rules provide any warrant for retracting a submission to jurisdiction

[4] Dr. Daxner ingeniously drew a distinction between recognising the jurisdiction of the Court as competent to lay down the law and accepting the jurisdiction of the Court as competent to decide the particular case; see p. 39 of the Reports. But the Security Council's resolution in regard to particular declarations must have had in mind the Court's competence to decide the case; for the terms of the resolution see Series D, p. 98.

already complete. The Permanent Court in *Judgment No.* 12 *The Rights of Minorities in Upper Silesia* (*Minorities Schools*) [5] removed any doubts upon this point when it said—

> 'If, in a special case, the Respondent has, by an express declaration, indicated his desire to obtain a decision on the merits, and his intention to abstain from raising the question of jurisdiction, it seems clear that he cannot, later on in the proceedings, go back upon that declaration.'

The question, therefore, was simply whether Albania's letter of July 2 had already established the Court's jurisdiction.

Albania's counter-memorial, when delivered on December 9, was virtually a restatement of the objections taken in the letter of July 2 to the United Kingdom's unilateral application. The difference was that, instead of waiving the alleged irregularity, the counter-memorial asked for judgment that the application was inadmissible. Albania, in effect, claimed two declarations from the Court—

> (a) that the Security Council's resolution taken under Chapter VI of the Charter did not render Albania subject to compulsory jurisdiction;
>
> (b) that, in consequence, the United Kingdom's only method of approaching the Court was by means of a special agreement submitted jointly with Albania.

The counter-memorial certainly had the appearance of a *volte face* and of a withdrawal of the waiver previously given. It is enough to say that at the hearing the Court did not accept Albania's explanation that the letter of July 2 had carried only an agreement to appear before the Court to argue the question of jurisdiction and not an acceptance of jurisdiction for the merits. Two other explanations given by Albania of its recourse to the plea to the jurisdiction are, however, worth a passing reference. First, the Albanian Agent at the hearing complained that in the circumstances the unilateral application was an affront to the dignity of Albania as an equal sovereign State. But such an application, in the absence of compulsory jurisdiction, has no more force than the cited State cares to give it and the allegation of unequal treatment seems to have no basis. In any event the United Kingdom, whether misguidedly or not, believed Albania to be subject to compulsory jurisdiction. Secondly, Albania has represented that the unilateral application placed the parties in a position of inequality because it took no account of Albania's counter-complaint against the United Kingdom for alleged violation

[5] Series A 15, at p. 25.

of its sovereignty. This explanation merits more consideration but scarcely seems to have any greater substance. Article 63 of the Rules provides that a counter-claim may be presented in the counter-memorial if it is directly connected with the subject-matter of the application and is within the jurisdiction. These conditions were plainly satisfied by Albania's counter-claim. In any event, there was nothing to stop Albania filing a parallel application unilaterally which the Court would have joined with the United Kingdom's application.[6] It cannot, therefore, be maintained that Albania was materially prejudiced through the procedure adopted.

Albania's definitive plea to the jurisdiction, of course, stayed the proceedings on the merits and the President made a second Order on December 10 for the presentation by the United Kingdom of written observations on Albania's plea. These observations when presented were confined to the question whether the letter of July 2 constituted a voluntary acceptance of jurisdiction which caused the Court to be irrevocably seized of jurisdiction over the dispute. The United Kingdom merely reserved the right to argue the question of compulsory jurisdiction under Article 25 of the Charter, if called upon. The Court, in the event, declined to take the question of the letter first and both issues were fully argued at the hearing which began on February 26, 1948.

The two questions were, however, entirely distinct and, ultimately, the Court rested its judgment, dismissing Albania's preliminary objection, only on the effect of the letter of July 2. On the other hand, seven judges in a joint separate opinion and Dr. Daxner in his dissenting opinion, *i.e.*, exactly half of the Court, expressed their disagreement with the United Kingdom's contention that a recommendation by the Security Council, when acting under Chapter VI of the Charter, sets up compulsory jurisdiction. As the judgment itself consists largely of a construction of the Albanian letter and a reaffirmation of established principles, the separate opinions may attract more attention, touching, as they do, the most fundamental obligations of States under the Charter. But some of the implications of the judgment for the use of process by unilateral application are of general importance and the purpose of the present paper is to draw attention to them.

FORUM PROROGATUM UNDER THE PERMANENT COURT

Before examining the Court's pronouncements in the *Corfu Channel Case* concerning unilateral applications, it is necessary briefly to

[6] Cf, the procedure in the *Eastern Greenland Case*. Series A/B 48, pp. 271–2.

review the jurisprudence of the Permanent Court which established the *forum prorogatum* as part of its jurisdiction. Article 36 (1) of the Statute defined the Court's jurisdiction as comprising 'all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force'. Article 40 (1), dealing with procedure, said simply 'cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application addressed to the Registrar'. The Statute thus did not expressly cater for a jurisdiction completed by the submission of one party after the institution of proceedings. It will now be shown, however, that the Court interpreted the Statute as only requiring that jurisdiction should be founded on the consent of both parties and not as requiring that their consent should be expressed in particular forms or that it should be given before the proceedings were instituted.

The question of *forum prorogatum* came before the Permanent Court at an early stage and in more than one shape. In *Judgment No. 2, Mavrommatis Palestine Concessions Case (Jurisdiction)*[7] Greece's unilateral application was impeached by Great Britain on the ground that, when it was filed, Protocol XII of the Treaty of Lausanne, on which Greece relied as subjecting Great Britain to jurisdiction, had not been ratified and was not, therefore, in force. The Protocol had, however, become binding before the hearing of the case and, on Great Britain contesting the jurisdiction because of the initial irregularity, the Court said—

> 'Even if the grounds on which the institution of proceedings were based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.'

The Court thus held that the absence of one party's consent to jurisdiction when proceedings were instituted was cured by a subsequent consent to jurisdiction given outside, and without specific reference to, the proceedings before the Court.

In other cases the Court has found the consent of the party cited either in the written pleadings or implied from its conduct in arguing the merits without contesting the jurisdiction. In *Judgment No. 4, Interpretation of Paragraph 4 of the Annex*

[7] Series A 2, at p. 34.

following Article 179 *of the Treaty of Neuilly*[8] Greece made a unilateral application to the Court for the interpretation of the paragraph in dispute whereupon Bulgaria submitted observations on the substance of the application, without contesting the jurisdiction. The Court construed Bulgaria's action as completing an agreement to submit the point of interpretation to the Court and concluding the question of jurisdiction. In *Judgment No. 5, Mavrommatis Palestine Concessions Case* (*Merits*)[9] the Court regarded a secondary question of jurisdiction, its competence to interpret Protocol No. XII of the Treaty of Lausanne as established 'in consequence of an agreement between the Parties resulting from the written proceedings'.

The leading case is *Judgment No. 12, Rights of Minorities in Upper Silesia* (*Minorities Schools*)[10] which concerned a dispute between Germany and Poland regarding the Interpretation of the German-Polish Convention of 1922. Poland, which in its counter-memorial had dealt only with the merits, objected to the jurisdiction in its written Rejoinder, *i.e.*, in its second pleading and the fourth pleading in the case. The Court held that Poland had impliedly accepted jurisdiction by filing its counter-memorial without questioning the jurisdiction and was unable afterwards to retract that agreement implied from conduct. In the course of its judgment the Court made the following well-known pronouncements concerning the acceptance of jurisdiction—

> 'The Courts jurisdiction depends on the will of the parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it . . . The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms such as, for instance, the previous conclusion of a special agreement. Thus in Judgment No. 5 (cited above) the Court has accepted as sufficient for the purpose of establishing its jurisdiction a mere declaration made by the Respondent in the course of the proceedings agreeing that the Court should decide a point which, in the Court's opinion, would not otherwise have come within its jurisdiction. And there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it.'

[8] Series A 4, at pp. 5–6.
[9] Series A 5, at p. 27.
[10] Series A 15, at pp. 20–25.

It is true that Judge Huber, in a dissenting opinion,[11] stated that Article 36 of the Statute did not recognise that jurisdiction might result from the filing of a unilateral application outside the scope of any pre-existing jurisdiction merely because the Respondent replied by argument on the merits. He also said that 'the absence of a plea to the jurisdiction does not create jurisdiction' and that 'it is difficult to conceive that new jurisdictional powers—even in regard to a particular case—could be indirectly inferred from the line of conduct of Agents'. He was supported by Judges Nyholm and Negulesco but the rest of the Court held otherwise and their decision was reaffirmed in *Judgment No.* 13, *Chorzow Factory Case (Merits)*[12] and in the *Société Commerciale de Belgique Case.*[13] In the latter case the Court said—

> 'With regard to its jurisdiction to adjudicate on these submissions, it is sufficient for the Court to observe that the Greek Government has raised no objection; on the contrary it has submitted arguments on the merits and has asked for a decision on the merits.'

Attention is drawn to these cases because one of the main Albanian arguments, as will be seen, was really an attempt to return to the views of Judges Huber, Nyholm and Negulesco in the face of the settled jurisprudence of the Court.

Equally significant was the discussion of *forum prorogatum* at a meeting of the Judges in 1936 for the revision of the Rules of Court.[14] The point at issue was whether in Article 32 of the Rules the Court should insist that an application shall specify the provision on which the applicant founds jurisdiction. The judges, with only two dissentients, considered it undesirable to tie an applicant State down to specifying in every case a provision establishing jurisdiction as this would be detrimental to the *forum prorogatum*. The following statement, attributed to Judge Schucking, expressed the majority opinion—

> 'It was not desirable to insist on the application containing a reference to the treaty clause upon which it was based. The institution of the *forum prorogatum* has been introduced into the procedure by the Court's practice, in particular in Judgment No. 12 and it was in the interests of the good administration of justice. If they now made it a necessary condition for the admissibility of an application that it must specify the treaty clause, and if, in a given case, the applicant

[11] *Ibid.*, at pp. 52–55. Cf. also the dissenting opinions, Judges Nyholm at pp. 56–59 and Negulesco at pp. 67–73.
[12] Series A 17, at p. 37.
[13] Series A/B 78, at p. 174.
[14] Series D No. 2 3rd add. Especially at pp. 69–71 and at p. 157.

were unable to specify it because no such clause existed, the Court would be compelled to reject the application *a limine*. But that would amount to abolishing the institution of the *forum prorogatum*, and, in his view, that would not be in the interests of international justice.'

The upshot was that Article 32 was amended to read as in its present form—'It must also *as far as possible* specify the provision on which the applicant founds the jurisdiction of the Court'. The italicised words were thus inserted with the express purpose of allowing unilateral applications despite the absence of compulsory jurisdiction.

The position under the Permanent Court regarding unilateral applications filed against a State not subject to compulsory jurisdiction is, therefore, free from doubt. Such an application, whether it specified an invalid ground of jurisdiction or no ground at all, might prove nugatory but it was not inadmissible. The Court would not reject it *in limine* but would transmit it to the party cited. If the latter, either expressly or by implication from conduct, submitted to jurisdiction, the Court was irrevocably seized of the case.

THE JUDGMENT IN THE CORFU CHANNEL CASE

The Albanian Counsel acknowledged the high persuasive authority of the jurisprudence of the Permanent Court. Faced with this jurisprudence—and starting from the premise that the United Kingdom's contention concerning Albania's liability to compulsory jurisdiction by reason of Article 25 of the Charter was ill-founded—Albania advanced two alternative arguments :—

(a) the application, since it did not specify a valid provision founding the jurisdiction of the Court, infringed Articles 40 (1) and 36 (1) of the Statute and was totally inadmissible. It, therefore, could not be validated by any subsequent acts on the part of Albania and could not form one side of an agreement to refer to the Court under Article 36 (1) of the Statute.

(b) Even if the application were admissible, the Albanian letter of July 2 did not express an agreement to submit to jurisdiction but only to appear and argue the question of jurisdiction.

The second argument raises only a question of the construction of the particular letter and will not be further considered. The Court as already stated held the letter to constitute an unequivocal acceptance of jurisdiction for the merits.

The first argument, though skilfully presented, was clearly an attempt to return to the dissenting opinion of Judge Huber in

Judgment No. 12. It was in direct conflict with the jurisprudence of the Permanent Court and with the views of the majority of the judges at the revision of the Rules in 1936. The argument did not, in consequence, commend itself to the Court. Nevertheless, the reasoning by which it was supported has sufficient plausibility and interest to deserve careful examination. This reasoning is based on the *travaux préparatoires* behind Articles 36 (1) and 40 (1) of the Statute of the old Court.

The jurisdiction of the Court was stated in Article 36 (1) to comprise 'all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force'. Article 36 (1) grew out of Article 14 of the Covenant which prescribes that 'the Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it'. Lord Phillimore in 1920, speaking as a member of the Advisory Committee of Jurists for the drafting of the Statute,[15] insisted that the word parties, as a matter of mere language, means *both parties*. He said—

> 'Article 14 can mean only one thing: the consent of both Parties is necessary before a case can be taken before the Court. English legal phraseology uses the plural, in speaking of the Parties concerned in a case, only for the purpose of referring to the two contesting Parties.'

Albania, whose argument on this point was endorsed by Dr. Daxner, relied particularly on this dictum in asserting that the word 'parties' in Article 36 (1) means both parties *together*. It may, in fact, be conceded that the *travaux préparatoires* indicate that the framers of Article 36 (1) used the phrase 'which the parties refer to it' with joint submissions by compromis in mind. It is, however, equally clear that in Article 36 (1) they were dealing with the substance and not the procedure of jurisdiction. In the absence of compulsory jurisdiction, they regarded the consent of both parties as essential before the Court could be seized of a case. This is not the same thing as requiring the initial application to the Court to be a joint application. They may also have considered that necessary, but the question of procedure was left to Article 40 (1) of the Statute.

Article 40 (1), which has already been cited, reads 'Cases are brought before the Court, *as the case may be*, either by the notification of the special agreement or by a written application addressed to the Registrar'. Now Dr. Daxner[16] is

[15] Permanent Court of International Justice, Advisory Committee, Minutes of Meetings, June 18–July 24, 1920, p. 235; cf. also p. 224.
[16] At pp. 35–6 of the Report.

undoubtedly correct when he says that the *travaux préparatoires* of this clause indicate that its framers only envisaged two forms of proceedings (a) compromis and (b) unilateral application used in cases where the other party was subject to compulsory jurisdiction. Dr. Daxner goes on to draw the conclusion that under Article 40 (1) it is not competent for a State to present a unilateral application to the Court in a case of optional jurisdiction. Regarding, as he did, the British contention based on Article 25 of the Charter as misconceived, Dr. Daxner held the United Kingdom application as *prima facie* irregular, *i.e.*, in conflict with the Statute of the Court.

This reasoning cannot be lightly dismissed. But, followed to its logical conclusion, it would exclude any possibility of the *forum prorogatum* which was completely established under the Permanent Court and which Dr. Daxner himself recognises. The argument is that a unilateral application, not founded on compulsory jurisdiction, infringes both Articles 40 (1) and 36 (1) of the Statute. If that were so, the irregularity would not be one merely of form but of substance and, as Judge Schucking [17] pointed out, the Court would be bound *in limine* to reject the application as inadmissible. Counsel for Albania, in his first argument, went the whole length of saying that the United Kingdom's application was a nullity which could not be validated by any subsequent acts of Albania. Dr. Daxner regarded the application as inadmissible, null and void and yet at the same time capable of being validated by Albania. But he never satisfactorily explained how he reconciled the inadmissibility of the application with the principle of the *forum prorogatum*.[18]

The truth is that, whatever may have been the precise intentions of the framers of Articles 36 (1) and 40 (1) of the Statute it was altogether too late in the day to raise the Albanian argument in 1948. The argument had already been rejected by the Permanent Court and was summarily rejected by the New Court in the following important passage [19]—

> 'While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form.
>
> The Albanian contention that the Application cannot be entertained because it has been filed contrary to the provisions

[17] *Supra*, p. 385. The Court will take the objection to jurisdiction *proprio motu*; cf. the *Pless Case*, Series A/B No. 52, pp. 15–16; *Appeals from Hungaro-Czechoslovak Mixed Arbitral Tribunal Case*, Series C No. 68, pp. 262, 292.

[18] His distinction between jurisdiction as a competence to pronounce upon the law and jurisdiction as a competence to decide the case does not overcome this difficulty.

[19] At pp. 27–8 of the Report.

of Article 40 (1) and of Article 36 (1) of the Court's Statute, is essentially founded on the assumption that the institution of proceedings by application is only possible where compulsory jurisdiction exists and that, where it does not, proceedings can only be instituted by special agreement.

This is a mere assertion which is not justified by either of the texts cited. Article 32 (2) of the Rules does not require the Applicant, as an absolute necessity, but only, " as far as possible ", to specify in the application the provision on which he founds the jurisdiction of the Court. It clearly implies, both by its actual terms and by the reasons underlying it, that the institution of proceedings by Application is not exclusively reserved for the domain of compulsory jurisdiction.

In submitting the case by means of an Application, the Government of the United Kingdom gave the Albanian Government the opportunity of accepting the jurisdiction of the Court. This acceptance was given in the Albanian Government's letter of July 2, 1947.

Besides, separate action of this kind was in keeping with the respective positions of the parties in proceedings where there is in fact a claimant, the United Kingdom, and a defendant, Albania.

Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12. . . . " The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement."

The Security Council's recommendation has been relied upon to support opposite conclusions. But, in the first place, though this recommendation clearly indicates that the bringing of the case before the Court requires action on the part of the parties, it does not specify that this action must be taken jointly, and, in the second place, the method of submitting the case to the Court is regulated by the texts governing the working of the Court as was pointed out by the Security Council in its recommendation.

The Court cannot therefore hold to be irregular a proceeding which is not precluded by any provision in these texts.'

The principle of *forum prorogatum* which was established under the Permanent Court, has thus been reasserted by the New Court in its most ample form.

The Court, in the above passage, has perhaps gone even a little further than the Permanent Court in laying down so clearly that there is no irregularity, no conflict with the Statute or Rules of Court, in filing a unilateral application against a State not subject to compulsory jurisdiction. Such an application may prove abortive, since it is not enough, by itself, to establish jurisdiction, but it is not irregular. The Court has also finally disposed of the contention that, to implement a recommendation by the Security Council under Article 36 (3) of the Charter that disputing parties refer a legal dispute to the Court, the 'reference' must be a joint reference by special agreement. An application by one party is in no way inconsistent with the terms of such a recommendation, even if it be held that the recommendation has no obligatory force.[20]

These pronouncements have important consequences—

(a) There is now nothing to stop a State from unilaterally filing an application in any dispute,[21] except the possibility of it proving nugatory. The expense is negligible and a State, which sees no prospect of concluding a special agreement with its opponent, may with every propriety issue its writ and throw on its opponent the burden of refusing adjudication by the Court.

(b) Similarly, when the Security Council has recommended that a legal dispute be referred by the Parties to the Court under Article 36 (3) of the Charter, a State may with perfect propriety proceed by unilateral application, whether or not the other State is regarded as liable to compulsory jurisdiction under Article 25 of the Charter or otherwise. This is important, since the disputing States may well be at arms' length and in no mood to discuss a compromis with each other. Or, again, one party may seek to delay or prejudice the hearing by proposing unacceptable conditions for the compromis, but the Court's clear ruling in the *Corfu Channel Case* enables the other party to short-circuit the equivocation by filing an application unilaterally. The judgment has in this way lent additional strength to the Security Council's power of recommendation under Article 36 (3) of the Charter.

[20] Not only did half of the Court say that such a 'recommendation' has no obligatory force but, in addition, Judge Hackworth is on record before the Foreign Relations Committee of the United States Senate as holding the same opinion; see *The Charter of the United Nations, Hearings Before the Committee on Foreign Relations*, Revised Edition, p. 81.

[21] Unless, of course, the Parties have previously agreed upon another tribunal.

Thus the new International Court of Justice, by its first decision, has at once thrown its doors wide open to litigant States and in so doing has made itself as serviceable an instrument as possible for the settlement of disputes through the United Nations Organisation. When much else on the international horizon is dark, this, at least, gives cause for satisfaction.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AS A MODEL OF AN INTERNATIONAL COURT FOR HUMAN RIGHTS

By Professor Norman Bentwich, o.b.e., m.c., ll.d.

The Judicial Committee of the British Privy Council has been described as the most august tribunal in the world. It has been described, also, as the golden link of the British Empire. It hears appeals, civil, criminal and constitutional, which come from every corner of the Dominions and Colonies and Mandates of the British Crown, as well as from those consular courts, now very few in number, in which His Majesty exercises an exterritorial jurisdiction. It applies every variety of law—religious and secular, primitive native customs, English, French, Dutch, Spanish and Indian codes, decrees and ordinances of colonial governments, Turkish law which is maintained in Cyprus and Palestine, and the Moslem, Hindu and Jewish religious jurisprudence which is administered in religious courts within the British domain. It applies, too, international conventions, and may be called upon to declare the law of nations and interpret it for the British realm.

The origin of this supreme appellate tribunal of the British Commonwealth and Empire, and of other parts of the British legal system, goes back to the early Middle Ages, when the Norman or Plantagenet King was regarded as the fountain of justice, and any of his subjects could petition for the removal of a grievance. While the King's judges, the Justices of the King's Bench, represented the royal justice within the English kingdom, and the Lord Chancellor, the Keeper of the King's conscience, would administer remedies of equity on behalf of the King, if the law were found to be harsh and unconscionable in the individual case, the habit grew of referring to the King's Council of Nobles, the *Curia Regis*, any petitions concerning legal matters which came from the King's dominions outside Britain. For a few centuries those dominions were the Channel Islands off the coast of France, which were part of the Duchy of Normandy, and those parts of France itself which were conquered. But when the English people began to expand over the ocean, in the settlements of New England and in the West Indies, and to found under Royal Charter colonies or possessions of the Crown, the petitions became numerous and

called for the establishment of a special Committee of the Council on Business and Plantations. The King—or Queen—of England was still concerned to see that justice was done to the individual subject, whether in civil or in criminal matters, in any place under his sovereign authority. That concern extended to persons enjoying his protection, even though they were not liege subjects.

When, in the eighteenth century, British Chartered Companies became responsible for law and order in stations in India and in West Africa, the jurisdiction of the King's Council as the final court of appeal was extended. The Council received petitions from the judgments of courts of the Indian Provinces and of the British Residents in Indian States, and dealt with them in a judicial way. It received, too, about that time, an accession of judicial authority as the supreme tribunal for appeals in ecclesiastical cases in Britain itself, as well as in Admiralty affairs anywhere in the British realm. It was also a supreme tribunal of appeal in Prize cases arising in maritime war, and was called on to apply to them international law. The broader membership of the King's Council—now known as the Privy or Private Council, as compared with the Court of Parliament which in its judicial capacity is the House of Lords—marked it as the appropriate body for determining the divers legal matters which came from a far-flung Empire. Those matters were subject to diverse systems of law, and it was therefore fitting that the tribunal should include eminent persons who had experience overseas and were not simply masters of English jurisprudence.

For a long time, broad principles of justice, equity and good conscience were the main sources of the decisions of the tribunal, which was called upon to correct the mistakes of courts in remote territories, dealing with laws and customs strange to British ideas. Laymen, as well as the highest judges of the realm, would sit in the Committee. In 1833, however, in the reign of King William IV, and a few years before Queen Victoria ascended the throne, it was found desirable to establish a permanent body, composed exclusively of Councillors of judicial or legal experience. That was, and still is, the Judicial Committee of the Privy Council, which, though enlarged in recent times, has remained essentially unchanged for more than a century. The chief judges of the Dominions and Colonies and representatives of the Indian Bench and Bar may be made Privy Councillors, and therefore be qualified to sit. But the main and permanent nucleus of the tribunal is composed of the highest judges of the United Kingdom, the Lord Chancellor, the ex-Lord Chancellors, and the Law Lords who are life peers and sit also in the House of Lords. Judges of the English Court of Appeal, who are always Privy Councillors,

are equally qualified to sit. The Court sits only in London. Until the Second World War its Chamber was in the Office of the Privy Council in Downing Street. It is rather a small room, with limited accommodation for the public, and without any of the ceremonial trappings of justice. During the air bombardment of London the Chamber was destroyed, and temporarily the Judicial Committee sat in a Committee Room of the House of Lords. It has now returned to the Chamber. The judges are not robed, and sit round the table, but Members of the Bar must be robed. The language of pleading is always English.

The jurisdiction of the Privy Council, which was laid down in the Statute of William IV, has not been fundamentally modified; except by recent legislation of the Parliaments of the British Commonwealth nations, which have now equal standing with the British Parliament. It can hear appeals not only from the highest or Supreme Court of any Dominion or Colony or Protectorate or Mandated Territory under British administration, but from any British court whatsoever in those countries, and whether in a civil or criminal case, if it considers that the interest of justice calls for it. In cases from lower courts and in criminal matters it grants special leave to appeal. Further, it hears appeals brought to it as of right from the decision of a supreme court in a civil case in any of these territories, where the value of the suit is above a certain amount, usually £500.

The Committee acquired an important new branch of jurisdiction when the British Colonies in North America, Australasia and South Africa were formed into Federations. It then became the supreme interpreter of the Constitution as between the Federal and the Provincial Governments. That was particularly the case with the oldest of the Federations, the Dominion of Canada; and the Judicial Committee has exercised in respect of that Dominion the same function as the Supreme Court of the United States has exercised in regard to claims between the Federal and the State Legislatures and Governments. When in the twentieth century the Colonies of Australia and later of South Africa were united, the feeling of national independence, a kind of autarchy, was already growing in the people overseas: and so the right of interpreting the Constitution was vested primarily in the highest court of the Dominion itself. The jurisdiction of the Privy Council could only be invoked either with the consent of that supreme tribunal, or after special consideration by the Judicial Committee. In the Irish Free State the right of appeal has been entirely abolished.

The part which the Privy Council has played in liberal interpretation of the Canadian Constitution is notable. Thus it was responsible for the decision which allowed women to be elected members of the Canadian Senate. The Supreme Court of Canada had held, on the interpretation of the Constitution, that the Governor-General was not entitled to summon women to the Senate. The Judicial Committee adopted the principle of progressive interpretation of statutes in accordance with changing circumstances. As it was said by the Lord Chancellor, Lord Sankey, in giving the advice to the Crown, which is always single : ' The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. Their Lordships do not conceive it to be the duty of the Board to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and living interpretation, so that the Dominion, to a great extent, but within certain fixed limits, may be mistress in her own house '. (*Edwards* v. *Att.-Gen. of Canada*, [1930] A.C. 124). It was responsible, again, for declaring invalid legislation of British Columbia which discriminated against Japanese immigration into Canada (*Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada*, [1924] A.C. 203). It was responsible, too, for settling vexed boundary questions between two Dominions or Colonies. For example, it decided that the vast territory of Labrador, which was contested between the small Dominion of Newfoundland and the great Dominion of Canada, belonged to the small country ((1927), 47 T.L.R., p. 289). That question came to the Privy Council on a petition from the Governments of the two Dominions begging the King to refer it to the Judicial Committee. It is one of the large powers of the Privy Council in its judicial capacity to ' hear or consider any such matter whatsoever as His Majesty shall think fit to refer to the Judicial Committee, and . . . address His Majesty thereon '. This reference of matters which are not purely judicial but of mixed judicial and political character may be directed either to the Judicial Committee or to a general Committee of the Privy Council. In the latter case the Committee advises the Crown in its executive capacity, and can take account of political considerations.

The broad functions of the Privy Council in interpreting the Constitution of any country under British administration are exemplified in a judgment which the Judicial Committee gave twenty-one years ago concerning an Ordinance passed by the Government of Palestine.[1] The judgment illustrates also the

[1] *Jerusalem-Jaffa District Governor* v. *Suleiman Murra*, [1926] A.C. 321.

power of the Privy Council to vindicate the rights of individuals or groups of people against any oppressive action by the Executive. The Mandatory Government had passed an Ordinance (that is, a local law), empowering the Administration to use the surplus waters of a spring near Bethlehem for the supply of Jerusalem at a time of great drought. The villagers whose spring was taken brought an action in the courts of Palestine claiming that the Ordinance was invalid. They urged that it was contrary to a provision in the Mandate for Palestine, which was embodied in the Palestine Order-in-Council, the document which lays down the principles and organs of government. The provision in question was that the Mandatory should safeguard the civil and religious rights of all the inhabitants. It was complained that although full compensation was to be paid, the taking of the water from the village spring infringed the civil rights of the Arab inhabitants. The Palestine High Court acceded to the complaint and issued an injunction against the Government. But the Privy Council allowed the appeal of the Government, holding that, on the true interpretation of the Order-in-Council, there was nothing to prevent the Government from taking property which was necessary for the well-being of the population, provided that fair compensation was given and that there was no discrimination between different sections of the people.

In recent years the Judicial Committee has been responsible for the final interpretation of the Constitution of India, and has heard appeals on constitutional questions brought from the Federal Court.

Nevertheless, its main functions continue to be those of a Supreme Court of Appeal for private suits. In civil matters it has to apply the laws of the country from which the appeal comes. In criminal cases, while the Committee may interpret local ordinances and codes, they are essentially the guardians of the fundamental principles of justice and fair procedure. It is only where they are satisfied that those principles have not been observed, that they overrule the judgment of the local court. Their jurisdiction in civil matters is in many ways comparable with that of the Supreme Court of the United States. The function of both tribunals is to vindicate the rights of the individual against State legislation which is found to violate those rights and to deprive a person of liberty or property without due process. But it is a peculiar feature of the Judicial Committee of the Privy Council that it protects the individual against judicial error as well in criminal cases. It is, then, a palladium of justice and liberty in the vast British realm. It is concerned equally for

justice to the humblest subject of His Majesty and for the biggest constitutional questions of the Empire.

The question presents itself whether the World Organisation of the United Nations can develop a judicial instrument which will in the international society exercise an authority for the protection of the individual's rights similar to that which the Privy Council exercises within the British Commonwealth and Empire to that end. The need of such an instrument will become urgent if the Economic and Social Council of the United Nations is to execute one of its main purposes set out in the San Francisco Charter. It is expressed to be among the functions of that Council to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all (Article 62). And it is further provided that the Council shall set up Commissions in economic and social fields and for the promotion of human rights (Article 68). The Council is designed to give effect to one of the principal purposes of the Charter of the United Nations, which is to promote and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion. These are large purposes. They will not be a living letter unless the United Nations establish organs for vindicating them when an individual or a group or a community complains that they have been violated.

It is notable that the first Court of International Justice, which was set up before the First World War, had as one of its principal purposes to take cognisance of questions brought by an individual against the Government of his own State or of another State. It was the Central American Court of Justice, established in 1907 by agreement between the five Republics of Central America, by which the States bound themselves 'to submit all questions which may arise among them, of whatsoever nature, in case the respective departments of Foreign Affairs should not have been able to reach an understanding'. The Court was to take cognisance of questions which individuals of one Central American country raised against any of the other contracting Governments because of the violation of treaties or conventions, and other cases of an international character, no matter whether their own Government supported the claim or not. There was a condition that the remedies which the laws of the respective country provide against such violation shall have been exhausted, or that denial of justice shall have been shown.

The Court also had jurisdiction over cases arising between any of the contracting Governments and individuals, when by common accord they were submitted to it. It did, in fact, examine several

cases brought by individuals against their Governments, for illegal arrest or detention, and for injuries to person and property which, it was alleged, had been caused by arbitrary acts. It did not, in all these cases, accept jurisdiction; and after the termination of the ten-year term for which it was originally created, the Court was not renewed. This first attempt to give an international court jurisdiction to hear complaints of an individual against a Government was not, then, completely successful; and when the jurists and statesmen came to determine the constitution of the Permanent Court of International Justice as the judicial instrument of the League of Nations, they restricted its jurisdiction to questions between States, and to the giving of advisory opinions to the organisations of the League. In fact, however, The Hague Court of International Justice was called upon many times to examine rights of individuals based on international conventions or treaties. Those matters were brought before it because the claims of the individual or the group were adopted by the State in a claim against another State which was alleged to have denied the right granted by international or national law.

After the First World War a number of mixed arbitral tribunals and mixed judicial commissions were established under the Treaties of Peace, to deal particularly with claims of individuals against Governments. As examples there may be mentioned the Mixed Arbitral Tribunals set up by the Treaty of Lausanne, which were composed of judges of several nations. Another temporarily successful judicial innovation of the kind was the International Court established in virtue of the Geneva Convention of 1922, to regulate the rights and obligations of Germany and Poland in the divided province of Upper Silesia. The story of that Tribunal has been written by its President, Judge Kaeckenbeeck. It was instrumental, during the fifteen years of its activity, in dealing with a large number of claims by individuals against the German and Polish authorities, complaining of some denial of right which was assured by the Convention.

One of the main advances in the San Francisco Charter, compared with the Covenant of the League of Nations, is to provide for international protection and vindication of human rights of the individual, as distinct from rights and obligations of States towards one another. The world learned, through the grim experience of the totalitarian régimes of Nazi Germany, Fascist Italy and militarist Japan, that, if human rights are denied within a State, and if large sections of the citizens are deprived of the fundamental freedoms, that is bound to affect the peace and security of the world. While, then, one of the principles

of the San Francisco Charter purports to limit the right of the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State (Article 2 (7)), it follows from the purposes of the Charter that a denial of human rights to the citizens of a country can no longer be regarded as 'essentially a matter within the domestic jurisdiction of the State'. Henceforth, there will be no fixed frontiers of international law. They will be moving frontiers, like those of the United States in the nineteenth century. The treatment by a State of its own subjects, questions of regulation of immigration, the grant or denial of the fundamental freedoms to the inhabitants of a country, whether a sovereign State or a colony—these matters, which have hitherto been regarded as of domestic jurisdiction, will in the new World Order be concerns of the United Nations. How shall they be effectively examined?

The Privy Council in England has been an effective instrument for safeguarding such rights in vast territories and for enormous masses of people who are subjects of the British Crown or protected by the Crown. Similarly, the Supreme Court of the United States has been a potent instrument during the last century for vindicating the rights of the individual citizen against any usurpation of authority by the State or by the Federal Legislature, which is contrary to the provisions of the Constitution of the United States. What is required in the World Organisation is some judicial authority which can give effect to the conception of an international guarantee of human rights—an International Bill of Rights—and to something like world citizenship.

It seems obvious that the International Court of Justice, which has been renewed under the Charter of the United Nations, and of which the Statute maintains, with little change, the composition, the jurisdiction, the law and the procedure of the former Permanent Court of International Justice, cannot itself deal with these additional functions. Some new international tribunal will be required for this purpose. And it cannot be the Permanent Court of Arbitration, which, like the International Court of Justice, is concerned essentially with questions between States. A bolder development is called for.

The American Bar Association, at its meeting in Chicago in 1944, proposed the establishment of an international Circuit Court, to hold regular terms in the capitals of each of the Members of the United Nations. No doubt the experience of the Circuit Court of the United States induced the proposal. It may not be necessary for a court of the kind to sit in every capital; but, on the other hand, it would be desirable that it should sit regularly

in some central place of a region, so that the vindication of rights would be possible without putting an excessive burden on the individual. In this connection it is notable that the International Committee of Jurists, which proposed changes in the International Court of Justice before the holding of the San Francisco Conference, put forward alternative schemes for enlarging the composition and widening the geographical jurisdiction of the Court.[2] The larger plan was to form two or more Chambers of the Court, competent to deal with cases brought outside Europe, and attached to some large region, *e.g.*, the Pacific region, which would embrace a number of States adhering to the Statute of the Court. That plan would involve an increase in the number of permanent judges, and also the appointment by each country of a national judge who would be a member of a panel to be called upon whenever required. The alternative scheme was for the establishment of occasional Chambers, which would be composed of a majority of the permanent judges of the International Court, with a minority of representatives of the region in which the Chamber would sit. Those occasional judges might be either supplementary judges of the principal Court, or national judges chosen by the Government of the country to which the claimant belongs and by the defendant Government.

It would be premature to consider now which of these different plans—the creation of circuit courts, or the establishment of Chambers of the International Court of Justice which would hold sessions in different parts of the world—would be the most suitable. The broad development envisaged is of an international court, sitting in different regions and expressly authorised to consider cases brought by individuals, either against their own State or against a foreign State, on account of a denial of rights assured by international law.

It would be necessary to have a procedure for sifting cases presented to the Court, so as not to allow the jurisdiction to be abused. Only where the preliminary examination indicated that there was a serious issue to try, would the suit be referred for hearing to the International Court. The practice of the Judicial Committee of the Privy Council contains a safeguard of that kind by the condition that, in all criminal cases and in many civil matters, the appeal is only entertained if the Judicial Committee itself, after hearing a preliminary application, has granted special leave to appeal, because it is satisfied that an important issue of law or justice is involved. The International Court which is

[2] See *American Journal of International Law*, Vol. 39 (1945), Documents, p. 35.

to hear claims of individuals, in whatever form it is constituted, must include representatives of the main systems of law among the United Nations. There should be, for example, an authoritative representative of the Islamic system, the Chinese system, the Latin-American system, as well as of the English and the European Continental systems.

As time goes on, it is to be expected that the Court would be primarily concerned with the application of a truly international law concerning individuals' rights, which it would itself develop. The jurisdiction of the International Court would include a power to give advisory opinions to any international organ of the United Nations concerned with the protection of human rights and fundamental freedoms. That would be similar to the power already vested in the International Court of Justice, and similar, also, to the power of the Privy Council to advise the Crown on any reference which is made to it, whether in a purely judicial or in a mixed judicial and political issue. The Charter contemplates the formulation by the Economic and Social Council of international conventions concerned with fundamental human rights and freedoms. If those conventions are issued, and adopted by the Member States, in the same way as the conventions and recommendations of the International Labour Office have been adopted by the Members of the League of Nations, they would give a firm and continuous basis of international law concerning human rights and freedoms. The conventions and recommendations would be the main sources of law for an International Court to which the individual would have access. At the same time it would be desirable for the Court to be empowered to apply the national law of the defendant Government where a person complained of a denial of human rights or fundamental freedoms, and could not base his claim on a specific international convention. Moreover, the Court would have to take account of the great variety of human rights due to the different stages of civilisation of races and nations and peoples, all of whom enjoy the protection of the United Nations.

The vindication of human rights by the organs of the World Society can best start through a judicial tribunal. Just as the protecting power of the British Crown over all its subjects has been exercised and applied through the judicial instrument of the Privy Council, so the protecting power of the World Society, embodied in the United Nations, may be exercised in the first place through its judicial organs. The judicial power will precede the legislative and the executive power of the World Order.

THE PROVINCE AND STANDARDS OF INTERNATIONAL ECONOMIC LAW

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International economic relations[1] are front page news. The Marshall Plan, devaluation of the French franc, Geneva and Havana Trade Conferences, Anglo-Russian trade relations, the Andes Trade and International Wheat Agreements, inter-Allied discussions on German currency, foreign assets in Austria, nationalisation of British and American owned property in Eastern and South Eastern Europe and proposals for a Western Customs Union are but a few items selected at random. Each of these problems has its intricate legal aspects, and they all are within the province of public international law. It may not be inappropriate, therefore, to inquire whether the science and practice of international law are properly equipped to deal with this host of topical issues.

I. The Challenge of an Expanding Field

The answer to this question can hardly be an unqualified affirmative. In this respect, international lawyers during the liberal era between 1815 and 1914 were in an enviably simple position. Both on national and international levels, economic and financial transactions were primarily within the sphere of private initiative. The gold standard, and other standards related to it, operated automatically. All that States were expected, and required, to do was to keep the ring for industry and commerce by the conclusion of not very complicated treaties of commerce. Their purpose was to ensure the maximum of freedom for commerce and navigation. This object could be achieved by means of few and straightforward legal devices, such as treaty clauses providing for most-favoured-nation or national treatment or for minimum standards regarding the life, liberty and property of foreign nationals. There were minor controversies such as the

[1] The terms *international economic relations* and *international economic law* are used in this article as including, and applying to, international financial and monetary transactions.

argument between Great Britain and Russia on the compatibility of export bounties for sugar with most-favoured-nation treatment or the dispute between Britain and the United States of America regarding the Panama Canal tolls. These, and other differences of a similar character, could be adequately settled within the traditional framework of international law. Imperialism, as it developed after the nineties of the last century and unfolded itself in the one and a half decades of this century, already forecast what was to come. The turning point, however, was the first World War. Then the picture changed rapidly. The disequilibrium caused by the war, the problems of reparations and inter-Allied debts, the growth of economic nationalism and protectionism and last, but certainly not least, the general trend towards control by the State of activities formerly reserved to the individual, deeply affected national and international economics. On the national level, this avalanche of changes brought with it a marked shift in emphasis from private to public law. It also led to a vast expansion of the customary realm of the law of nations. It was not surprising that in this changing environment the lawyer should temporarily lose his bearings and look suspiciously like a relic of old and bygone days.

A glance at the textbooks of the inter-war period and at the syllabuses in international law of the law schools of the leading universities all over the world will indicate how the challenge was met. It is probably no exaggeration to say that it was done largely by ignoring the problem. There were plenty of good reasons for adopting this line. There were—and still are—too few teaching posts in the field of international law. The few scholars and practitioners specialising in the subject were overburdened with ordinary day-to-day commitments. Thus, the tasks awaiting treatment were mainly left undone. To put matters in this way, is not to be lacking in appreciation to the few exceptions to the general rule, to men like Sir John Fischer Williams, Jèze or Lippert, but rather to emphasise the debt of gratitude which international lawyers owe to these scholars. It was not accidental that each of these distinguished specialists either had come out of government service or was in exceptionally close touch with the government departments concerned with such matters. The legal experts of foreign offices and trade departments were—and in the main still are—the only reliable repositories of knowledge in this field. Yet to be fair to international lawyers elsewhere it is necessary to realise that, simultaneously, international law was expanding in many other directions. International institutions grew—and are still continuing to grow—on a tremendous scale and

opened out a wide vista in the law of international institutions. New problems of international communications were raised by the emergence of the aeroplane as a means of international transport for passengers and goods and gave scope for an international law of the air.

The hesitation of international lawyers to embark on these new fields was strengthened by the growing awareness of a more fundamental problem. Their traditional exposition of international law was the result of accumulated wisdom, derived largely from deductive speculation and the use of rather questionable eclectic methods. This attitude did scant justice to the vast amount of evidence of a much higher intrinsic value such as the decisions of international and national courts and the practice of States. Thus there was an equal—if not more pressing—need for the overhaul of the whole system of traditional international law and its revaluation by means of an inductive approach.

It is necessary to draw attention to the whole of this chaotic picture in order to understand that the problem of international economic law is only one facet of a much wider question. The science of international law is confronted with an issue which has been faced long ago by every mature and self-respecting system of municipal law. Any such system required the kind of treatment which one may expect to find in a competent book or course on Jurisprudence or English Legal System. Side by side, however, with these general topics, there are the various branches of municipal law. They are recognised as proper subjects for separate and technical treatment. An English lawyer would not expect to find a detailed picture of the laws of Contract, Tort, Evidence, Commercial Law or of Conflict of Laws in a bird's-eye view of English law. Yet this is the amorphous state in which international law still is. Writers and teachers attempt as best they can to cope in general treatises and lecture courses both with the general and more particular aspects of their subject.

It would seem that the time has come for the establishment of separate branches of international law, supplementing treatises on, and teaching in, the general principles of international law. Such specialisation will not only result in providing more adequate knowledge in the narrower fields, but is likely to enrich insight into the nature, functions and principles of the law of nations as such. It would surpass the scope of this paper to elaborate in detail the subjects which will call in the near future for such treatment. Yet in order to initiate a discussion, a few suggestions may tentatively be put forward.

From the point of view of research, there is need for serious

studies in the fields of the history and sociology of international law. Yet there are other subjects which may appeal more to pragmatic minds, especially the minds of those who hold the purse strings: the Law of International Institutions, the International Law of the Air, International Labour Law and International Economic Law. It must suffice here to make a case for the last-mentioned subject. Yet *mutatis mutandis* much of the argument will equally apply to other branches of international law.

II. THE PROVINCE OF INTERNATIONAL ECONOMIC LAW

The case for recognising a special branch of law depends on whether certain topics are not at all, or not adequately, dealt with within the existing framework of a legal system. In international law, which is primarily a system of customary law, this is especially likely to happen if the new developments are the result of treaties. Where this is the case, the normal procedure is to deal fully with the basic rule of international customary law involved and to consider any modification by way of treaties as an exception to the principle.

In order to indicate the scope of international economic law, it may be advisable to list some of the topics which it is proposed to treat as a separate branch of international law. In the new syllabuses in International Law for the Degrees of LL.B. and B.A. which the University of London has recently brought into operation, international economic law and the law of international institutions figure as alternative special subjects. It may be of some general interest to enumerate the problems which, according to these syllabuses, are considered to fall within the purview of international economic law. These are:

'Basic standards, with special reference to the standards of national and most-favoured-nation treatment. Protection of property abroad. Commercial treaties, monetary agreements, State loans and other State contracts. The Calvo Clause, methods of international financial control, and the Porter Convention. The law relating to trading with the enemy, the international economic and financial law of military occupation, the protection of neutral property, and the law of reparations. The law of international economic and financial institutions.'

What is the common denominator for these varied items? Are they nothing but a rather heterogeneous collection of wallflowers of traditional international law? It is true that most of them have been rather neglected in the doctrine and teaching of international law. They all have, however, another feature in common. They are topics of public international law in which there is a

predominant economic element. Thus, an admittedly extraneous criterion is made the test of whether a subject falls within this new branch of international law. From a functional point of view, there is nothing strange in this method. All law serves social purposes. It might even be consonant with common sense to group legal rules according to the social ends for which they exist. The legal purist may object that this is all very well if we are dealing with the sociology of law. What is to be gained from such classification for the purposes of legal analysis? The argument is to the point and has to be met. The choice of these topics, and with it the justification for this whole branch of international law, depends on the affirmative answer to another question : Are there legal principles which apply to all—or at least to whole groups—of these topics? The very fact that most of them are the products of treaties appears to contradict such a possibility. Unless treaties are of a merely declaratory character, their very purpose is the modification or abrogation of international customary law. They are but *lex inter partes* and, thus, hardly vehicles of generally applicable principles of international law. Such reasoning ignores, however, one of the most important functions fulfilled by treaties in the evolution of international law : the establishment of optional standards of international conduct.

III. OPTIONAL AND COMPULSORY STANDARDS IN INTERNATIONAL LAW

The growth of international law cannot be adequately understood if, as is mostly done, it is seen through the mirror of the history of the doctrine of international law. As will be shown in more detail elsewhere, there is a remarkable continuity in the practice of the European law of nations since the early days of the Middle Ages. Within and outside the Holy Roman Empire there was a sufficient number of *de facto* and *de jure* sovereign princes who found it advisable to fill by treaties the void of lawlessness then existing in inter-State relations. To give an idea of the importance of treaties at that early stage, it may be mentioned that there are at least twenty-one treaties of a truly international character which were concluded by the kings of England with foreign princes during the twelfth century. What we call today the Law of Peace was a state of international relations which entirely depended on treaties establishing such a foundation for peaceful intercourse between nations. The precariousness of this status was underlined by time limits during which it applied and still more by the greater frequency of treaties which were content merely to provide for a state of truce. In the absence of such treaties, any foreign

prince or merchant was an enemy and liable to suffer any form of arbitrariness and violence.

The principle of reciprocity mitigated unrestricted indulgence in licentiousness. *Magna Carta* offers evidence of the reality of the operation of this principle. Subject to the reservation of the ancient liberties and customs of the English boroughs, the Charter granted personal freedom and security to foreign merchants during their stay in England. In Article 41, it was provided that they were not even to be disturbed in case of war, provided that English merchants were treated abroad in the same manner. Yet freedom of commerce could be established on a safer basis by treaties creating mutual legal obligations than by unilateral promises under municipal law. It was also found convenient to enlarge the scope of such freedoms on a footing of mutuality. The treaties concluded in this field, as in others, by the kings of England with other sovereigns developed on the most varied patterns. Some of them were quickly discarded, while others were regarded as being so useful that they were repeatedly applied between the same powers and copied in other treaties. Thus, there are numerous treaties in which the rights of foreign merchants were set out in great detail. Treaty clauses provided for the safety of their persons, dwellings and business houses. Their right of access to court in matters civil and criminal as well as their right of exit with their property and exemption from obnoxious taxation, were expressly stipulated. There came a time, however, when it was no longer considered necessary to proceed in so cautious a manner. It was to the advantage of every prince that his subjects should enjoy such considerate treatment and it was gradually taken for granted that foreigners would be treated in this manner. From this, it was only one further step to the next stage when it was held that the home State of a foreigner could expect as of right such treatment of his subjects abroad. The same development could be sketched in the fields of denial of justice, of the law of wreck or of limitations of lawful reprisals.

What is the significance of these treaties for the growth of international law? This will become apparent from a comparison of the treaties establishing minimum rights of foreigners under international law with the same rules as they now exist under international customary law. In both cases, they provide international standards of conduct. Once, however, such a standard has become embodied in international customary law, it is compulsory and backed by all the sanctions of international law. If the standard rests on a treaty, it is optional in the sense that any State is free to enter or not to enter into such a commitment. By

means of treaties States can circumscribe precisely the operation of a standard and limit it by exceptions, often in favour of other standards. Thus, the most-favoured-nation standard comes into operation only by means of treaties. Contracting parties may, for instance, exclude contingencies in which reasons of national or international public policy may make the application of differential treatment advisable. Or, in certain cases, the most-favoured-nation standard may have to give way to the standard of preferential treatment, as, *e.g.*, is enjoyed under the Ottawa Agreements by members of the British Commonwealth of Nations.

Compulsory and optional standards of international conduct have in common that they are generally applicable patterns. The former, however, operate automatically unless expressly abrogated or modified by treaty. The latter only come into operation by means of treaties. As a rule, there are various patterns which are at the disposal of contracting parties. There is no limit to the initiative and imagination of parties to a treaty. They may wish to adopt well-known patterns or they may venture into the unknown and experiment with variants of old patterns or evolve new standards. Thus treaties provide a fascinating field of pioneer work. Some of the clauses may prove so ingenious and attractive—as happened in the case of the most-favoured-nation standard—that they provide prototypes for innumerable draftsmen following in the footsteps of their predecessors. In the course of time others may become so commonplace that they sink back into the body of international customary law. Others again may be most suitable for relations between States which desire to establish a highly integrated connection with each other as, for instance, clauses usually only to be found in treaties by which a customs union is established. Finally, some standards are more suitable for relations between States with radically different ways of life such as the Soviet Union and the United States of America. Thus, standards are a means of elastic and experimental legislation in the realm of international law, and treaties are the instruments by which, *inter partes*, standards are transformed into temporary or permanent rules of international law.

The recognition of the fact that treaties fulfil the function of transforming hypothetical into compulsory standards of conduct at the option of the contracting parties may assist in overcoming the habit of underestimating their importance for international law.

In order to explore this multitude of optional patterns evolved by nations in the period of more than eight hundred years during which modern international law has been developing, it is necessary to group together treaties which fulfil the same or similar social

functions. This is the ultimate justification for separate branches of international law based primarily on treaties and held together by the unifying bond of the same social purpose. The real test, therefore, of the need for recognising international economic law as a separate branch of international law is whether or not there are specific standards of international conduct which distinguish this branch from other branches.

IV. THE STANDARDS OF INTERNATIONAL ECONOMIC LAW

British State practice in the field of international economic and financial law presents a unique continuity since the days of Henry II who, in 1154, concluded a treaty of commerce with Cologne. The following summary is an abstract of a more comprehensive survey of the treaty practice and standards applied by England in the field of international economic law during the last eight hundred years. This unbroken record may assist realisation of the fact that international economic law may be very junior as an academic discipline, but, otherwise, it may lay claim to considerable seniority. It equally serves as a reminder of the elasticity and permanency of standards some of which, as mercantilist, liberal or collectivist periods of national economies have succeeded one another, have at times made way for other standards and receded into the background only to revive again in a subsequent period.

Minimum standards deserve pride of place among the standards of international economic law; for, so far, they are the only standards in this field which have grown into rules of general international customary law. As already mentioned, they began by being incorporated in innumerable treaties in order to secure to foreign merchants a modicum of security for their persons and property. As can be shown by reference to the practice of States and international tribunals, these standards developed in time into rules of international customary law and their applicability was widened so as to apply to all persons sojourning in foreign lands. Thus, they offer an example *par excellence* of the contribution made by one special branch of international law to the growth of the general principles of international law, in this case the law of international torts.

A standard which can claim a very long pedigree is the *standard of reciprocity*. Princes promised each other that they would grant identical treatment to each other's merchants. As in the case of the law of diplomatic immunity, such reciprocal treatment could be applied in a narrow or liberal sense. It was in the mutual interest of princes to interpret extensively the scope of diplomatic

immunity, and this led to generously wide rules in favour of foreign diplomatic envoys. Similarly, the interests both of mercantilist and of liberal economies operated as a rule in favour of an extensive application of the principle of reciprocity in the economic field.

In the case of countries of similar structure and complementary interests, the *standard of national treatment* is appropriate. This standard provides for inland parity, that is to say, equality of treatment between nationals and foreigners.

Another standard which has proved to be of special utility is that of *most-favoured-nation treatment*. States undertake to grant each other the same rights or favours as they have granted, or may grant, to any third power. The special merit of this standard in its unconditional form is that it generalises automatically the advantages granted by any State to any other included in the nexus of most-favoured-nation treaties. The equalitarian function of this standard corresponds to one of the permanent interests of sovereign States. It is applicable irrespective of the internal political, social or economic structure of the contracting parties. This explains both the historical continuity in the application of the most-favoured-nation standard and the wide, if not universal, use made of the standard. It provides a common meeting ground for primitive and developed countries, agricultural and industrial economies, as well as capitalist and socialist States. In exceptional cases, it has been applied outside its original context of international economic relations. It is, however, in this field that the standard has constantly proved its usefulness. As the criterion of equal treatment is a third foreign State, it is compatible with discrimination between foreigners and nationals, and, thus, in protectionist and nationalist periods, not exposed to the objections which may militate against the standard of national treatment.

Related to the most-favoured-nation standard is the *standard of the open door*. Both aim at the same object: equality of opportunity for foreign States and their subjects. Yet in the case of the standard of the open door, the *tertium comparationis* is not primarily, or not only, third States, but any of the contracting parties. The standard is a typical product of an imperialist era, in which powers mutually jealous of each other impose self-denying ordinances on themselves and each other.

The *standard of preferential treatment* is in sharp contrast to these two standards. In an international system consisting only of three States, there would not be any automatic incompatibility between the standards of preferential and most-favoured-nation treatment. Yet in any wider inter-State system, both standards are mutually exclusive and can be only formally harmonised with

each other as, for instance, by way of an exception to most-favoured-nation treatment (in favour of neighbouring States or members of a customs union).

The last standard which can claim to be of general interest in this field is the standard of *equitable treatment*. The special importance of this standard lies in spheres affected by an increase in State planning. It also provides the only solution in cases in which currency disequilibrium or changes in the structure of national economies force States to adopt measures of quantitative restriction of imports. Then this standard provides the only means of operating the most-favoured-nation standard and of achieving an at least proportionate equality between foreign States.

V. THE FUNCTIONS OF THE STANDARDS OF INTERNATIONAL ECONOMIC LAW

To attain the maximum of freedom of commerce is a legitimate object of industry and commerce. In periods of mercantilism, political considerations call for certain types of exports, whereas others are equally firmly discouraged. In an era of economic liberalism, freedom of commerce tends to become a shibboleth. In State-controlled economies, a revival on a higher plane of the mercantilist approach to the problem is unmistakable.

Naturalist writers on international law tended to construe freedom of commerce as a natural right. If they did so, they interpreted this alleged natural right rather narowly or they subjected it to important exceptions. In the main, however, they were content to treat it as an imperfect right. In practice, this meant that questions of freedom of commerce were considered to be a matter within the unfettered domestic jurisdiction of States. Thus, there was only one way in which the ideal of freedom of commerce could be realised, that is to say, by the conclusion of treaties having that object.

There are exceptional cases in which a weak State may be forced to agree to a unilateral grant of freedom of commerce. There are more frequent instances in which defeated nations have to accept for an interim period unilateral limitations of their economic sovereignty which are explicable only on grounds of their inferior power. There are also a fair number of cases in which the reciprocal application of any of the standards of international economic law is merely of a formal character and constitutes a polite disguise of the reality of the situation : the economic domination of one country by another. Yet when all this is said, there still remains the great bulk of commercial treaties by which, on a

footing of reciprocity and mutuality, real freedom of commerce is achieved.

Their purpose is to establish freedom of commerce on a basis of substantial, as distinct from formal, reciprocity. Each of the standards of international economic law fulfils the function of promoting this object. Six of the standards have the feature in common that, through their medium, freedom of commerce is achieved on a footing of equality. But only the standard of national treatment secures absolute inland parity. The minimum standards and the standards of most-favoured-nation treatment and of the open door primarily aim at foreign parity. Their *raison d'être* is the exclusion of discrimination as compared with other foreign competitors.

It would be a mistake to think of these standards as operating in isolation from each other. If, for instance, the most-favoured-nation standard is coupled in a treaty with that of national treatment, it may well secure treatment to foreigners which is privileged as compared with that of the nationals of one of the contracting parties. Thus, a commercial treaty may provide for national and most-favoured-nation treatment. If it should then happen that one of the contracting parties should conclude a treaty with a third State exempting each other's nationals from military service, the State enjoying most-favoured-nation and national treatment may claim for its subjects exemptions which are not available to the nationals of the other State. A similar situation may arise when there is a clash between the standard of national treatment and the minimum standards of international law. As was held by the Permanent Court of International Justice in the case of the *Minority Schools in Albania* (1935), in such a case, equality of treatment is not enough. If absolute standards of international law, whether under treaties or international customary law, are involved, the home State of foreigners is entitled to demand compliance with such standards irrespective of the treatment meted out by the other State to its own nationals. Thus, the standards of international economic law offer to contracting parties a number of methods for achieving, in any given circumstances, the object of freedom of commerce. It is the merit of standards established by treaty that their geographical, temporal and functional scope can be determined at will by the parties. States may vary as they wish the clauses embodying these standards. It would mean, however, not seeing the wood for the trees to concentrate on the multitude of accidental treaty clauses and to ignore the standards and their enduring significance.

VI. THE STANDARDS OF INTERNATIONAL ECONOMIC LAW WITHIN THE FRAMEWORK OF THE UNITED NATIONS

As long as the economic mechanisms of international trade were allowed to operate more or less automatically, a bilateral framework of the standards of international economic law sufficed. During the inter-war period between 1919 and 1939 this assumption no longer held true. Yet as generals are prone to prepare for the last war, so statesmen tend to save the last peace. The Covenant of the League of Nations was true to pattern. Though the era of free trade had gone for good, the political settlements of 1919 were based on the unstated major premise of a liberal international economic order. Article 23 (*e*), the only Article of the Covenant dealing with international trade, was the outward symbol of this mentality. It was left to the Permanent Court of International Justice in the case of *Railway Traffic between Lithuania and Poland* (1931) to reveal the minimum of legal obligations undertaken by League members under this Article.

The Atlantic Charter, Article 7 of the Anglo-American Lease-Lend Agreement of 1942, the Bretton Woods Agreements and the Charter of the United Nations breathe a new spirit. They have three features in common which are significant for the standards of international economic law. The objectives of international economic policy are considerably widened. Freedom of commerce is no longer the only—or even the main—reason for State concern with this field. Matters such as higher standards of living, full employment, economic and social progress and development are proclaimed as legitimate topics of joint international action. Furthermore, these objects are to be pursued within a consciously planned collective framework and in accordance with general principles laid down in multilateral treaties. Finally, international economic institutions on a scale unknown in the past have been called into being in order to provide substitutes for the vanished automatic mechanisms of multilateral international trade. The outstanding example is the International Monetary Fund. Its purpose is to secure the maintenance of the gold exchange standard and the prevention of competitive depreciation of exchanges. If it were not for the weaknesses inherent in the political superstructure of the United Nations, this development might well be described as the establishment of a public international economic order. The contemplated International Trade Organisation is to buttress this system in the field of international trade.

An important step towards this goal has been taken in the General Agreement on Tariffs and Trade, concluded at Geneva on October 30, 1947 (Cmd. 7258). Twenty-three States are

signatories to the Agreement. Subject to reservations, it has been brought in force provisionally since January 1, 1948, between some of the parties to the Agreement, including the United States of America and the United Kingdom. If the International Trade Organisation should come into existence, the essential parts of the General Agreement will be incorporated into its Charter. The Agreement, though limited in scope to questions of customs tariffs and international trade, is thus of more than transient interest. The analysis of the Agreement will be limited to its effects on the standards of international economic law.

(a) *The Geneva Agreement and the International Economic Order.* The Geneva Agreement operates within the wider international framework of the United Nations. The play of the standards is, therefore, limited in scope by the overriding requirements of this international economic order. The technical devices used to achieve this purpose are reservations formulated by way of exceptions. Thus, the contracting parties remain free to take any action in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security (Article XXI (*c*)). Equally, care has been taken to co-ordinate the Agreement with the obligations of the signatories towards the International Monetary Fund (Articles II (6) (*a*); VII (4) and XV).

(b) *The Geneva Agreement and the Most-Favoured-Nation Standard.* In accordance with Article I of the Agreement, the most-favoured-nation standard in its unconditional form applies to customs duties, charges imposed in connection with importation or exportation of goods or on the international transfer of payments for imports or exports, and to methods and formalities in connection with importation and exportation. In a subsidiary way, the most-favoured-nation standard is used in connection with matters of internal taxation and regulations (Articles I and III), freedom of transit (Article V (5)), marks of origin (Article IX (1)), and the administration of quantitative import and export restrictions (Article XIII (1)). As will be seen later, most-favoured-nation treatment under Article I is subject to important reservations in favour of the standard of preferential treatment. In addition, all standards are subject to general exceptions in the interest of national public order and the security of the signatories (Articles XX and XXI).

Paradoxical as it may sound, the greater the number of parties to a multilateral agreement adopting the most-favoured-nation standard, the more meaningless this standard becomes. In a bilateral treaty, the contracting parties automatically benefit from

any treaty in the same field concluded by one of the contracting parties with a third State. In a multilateral treaty embodying the most-favoured-nation principle, third parties are only the non-signatories. If ever such a treaty should attain universal scope, there would be no longer any State constituting the required *tertium comparâtionis*. In a world which is increasingly split between two major political and economic camps, this means that, sooner or later, most States within the magnetic field of the Capitol are likely to become parties to the Geneva Agreement and members of the International Trade Organisation. Members of the Soviet *bloc* will be the most likely 'third parties' in the meaning of the Agreement. It is the function of the most-favoured-nation standard as applied in the Geneva Agreement to prevent discrimination by any party to the Agreement in favour of such outsiders against other signatories.

In the absence of such treaties with third States, the most-favoured-nation standard remains inoperative in the Geneva Agreement and does not by itself prescribe any form of economic conduct in the relations between the signatories. Such standards are, however, embodied in bilateral treaties between member States. In addition, the Geneva Agreement itself provides substitutes for the inability of the most-favoured-nation standard to fulfil any regulative function of its own in the relations between signatories to the Agreement.

In the field of customs duties, schedules of tariff concessions for each party to the Agreement have provided the solution. These were reciprocally negotiated, but made an integral part of the Agreement (Article II (7)). It was left to every signatory to determine for itself the scope of such concessions. Subject, however, to reservations regarding the withholding and withdrawal of concessions (Article XXVII), action in emergencies (Article XIX) or in the case of nullification or impairment of concessions (Article XXIII), and the modification of schedules (Article XXVIII), these schedules provide the level of foreign parity regarding tariffs between the signatories to the Geneva Agreement (Article II (1) (*a*)).

Doubtful points in the evolution of the standards of international economic law are expressly settled. The limits within which anti-dumping and countervailing duties are considered compatible with the principle of non-discrimination are clearly defined (Article VI). The parties apply the principle of non-discriminatory treatment to State-trading enterprises (Article XVII). Special advantages may be granted to each other by

neighbouring States for the facilitation of frontier traffic and by members of a customs union (Article XXIV).

In order to encourage the expansion of multilateral trade, the signatories undertake to eliminate quantitative restrictions on import and export trade (Article XI (1)). This rule is, however, subject to all important exceptions in scope (Article XI (2)) and in the interest of the balance of payments (Articles XII–XV).

(c) *The Geneva Agreement and the Standard of Equitable Treatment.* It is too early to say whether there is any justification for the optimistic long range assumptions made by the draftsmen of the Geneva Agreement. After the transitory period envisaged in the Agreement is terminated—for most purposes March 1, 1952 (the end of the Bretton Woods Interim Period)—international trade is pictured in terms of a buyers' market supplied with plenty of now scarce currencies. Until this becomes true, the exceptions and reservations laid down in the Agreement are more important than its postulated principles. Some currencies are likely to remain scarce for a considerable time to come, and quantitative restrictions, especially of imports, will have to be retained. Equality of treatment can then only be achieved on a footing of proportional equality. Here the standard of equitable treatment comes into its own. In principle, quotas fixed by a party to the Agreement are to be allotted by reference to the share of other signatories in any particular trade during a representative base-period (Article XIII (2) (*d*)). The standard is equally applicable where, for other reasons such as the protection of home agriculture or fisheries or owing to a shortage of supplies, State control and regulation in any field becomes imperative (Articles XI (2) and XX (2) (*a*)).

(d) *The Geneva Agreement and the Standard of National Treatment.* In any case in which, under a bilateral treaty, a signatory to the Geneva Agreement should grant national treatment to any third State, the general most-favoured-nation clause of Article I would automatically make any party to the Agreement eligible to share such advantages. The Agreement, however, provides expressly for national treatment of contracting parties as regards internal taxation and regulation (Article III). In this case, the standard of national treatment fulfils an auxiliary function. Discriminatory internal taxes might frustrate the effects of the concessions made under the tariff schedules. The standard of national treatment is equally implied in the provision for freedom of transit (Article V).

(e) *The Geneva Agreement and the Minimum Standards.* In matters concerned with freedom of transit, the Geneva draftsmen

could build on the foundations laid by the Convention and Statute on Freedom of Transit of 1921. They were similarly helped in laying down a code of international commercial conduct by earlier multilateral treaties such as the Convention for the Publication of Customs Tariffs of 1890, the Convention for the Simplification of Customs Formalities of 1923 and the Agreement on False Indications of Origin on Goods of 1925. The essential features of the provisions on valuation for customs purposes (Article VII), customs formalities (Article VIII), marks of origin (Article IX) and publication and administration of trade regulations (Article X) are certainty, publicity, good faith and reasonableness. One of these clauses (Article X (3)) deserves to be singled out for special comment. The signatories undertake to maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. By this is meant provision for objective and impartial review of administrative action even though such procedures may not be fully or formally independent of the agencies entrusted with administrative enforcement. Thus, as in the wider field of the minimum standards of international law, it is again a treaty which, in the first instance, makes it incumbent on States to grant a certain minimum of justice and judicial protection to foreign nationals and companies in matters in which they would otherwise be completely at the mercy of other States. The function of the minimum standards of international economic conduct as formulated in the Agreement is to assist in the application of the Agreement in accordance with the intentions of the contracting parties and to prevent a circumvention of the other standards through petty administrative discrimination.

(f) *The Geneva Agreement and the Standard of Preferential Treatment.* Any form of preferential treatment is permitted in the Geneva Agreement only by way of exception. Within the limits laid down in the Annexes to the Agreement, tariff preferences and arrangements in force within the British Commonwealth and Empire, between territories of the French Union, between the Benelux countries, the United States and the Philippines, between Chile and her neighbours, and between the Lebano-Syrian Customs Union and Palestine and Transjordan may be maintained. It must, however, be remembered that, in connection with the negotiations of the schedules of tariff concessions, some of the preferential margins were substantially reduced and others completely eliminated. Furthermore, the Agreement contains a ceiling for margins of preference (Article I (3)). Finally, it is impossible for signatories

to create new areas of preferential treatment by way of a customs union on terms less favourable to other signatories than they enjoyed in the constituent territories prior to the formation of such a union. Even then only a complete customs union may be envisaged, that is to say, a customs union which amounts to the substitution of a single customs territory for two or more customs territories. Any other new arrangement of a preferential character that falls short of a complete customs union is compatible with the Agreement only if it can be considered as an interim arrangement leading within a reasonable time to a full customs union as defined in Article XXIV of the Geneva Agreement.

(g) *The Geneva Agreement and the Standard of Economic Good Neighbourliness.* Article 74 of the Charter of the United Nations which forms part of the Chapter on Non-Self-Governing Territories embodies a principle which is not limited to the colonial sphere. Accordingly, members of the United Nations agree that 'their policy in respect of the territories to which this Chapter applies, *no less than in respect of their metropolitan areas*, must be based on the general principle of good neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic and commercial matters'.

The Geneva Agreement proves that the principle of international good neighbourliness can be more than a merely Platonic declaration. The draftsmen of Geneva have widely applied the principle and transformed it into a new standard of international economic law: the standard of economic good neighbourliness. They have achieved this object by a number of devices which form a constructive alternative to mere agreement to disagree on issues not susceptible at present of any hard and fast ruling.

Unilateral action on the part of contracting parties has been limited in cases in which it would merely amount to wanton use—or rather abuse—of sovereign discretion and, without any corresponding benefit to the signatory applying such measures, merely harm other States. Thus, anti-dumping and countervailing duties are only permissible if foreign dumping or subsidisation is likely to cause material injury to an established industry in the country contemplating such counter-measures, or will prevent or materially retard the establishment of a domestic industry (Article VI (5)). Similarly, measures authorised under the Agreement in the interest of safeguarding the national balance of payments must be really necessary in order to maintain reasonable monetary reserves and be applied in such a way as to avoid unnecessary damage to the interests of other contracting parties (Article XII). In the case of permissible departures from the rule of non-discrimination, it

is further stipulated that such practices must be closely limited so as not to handicap the achievement of multilateral international trade (Article XIV (1) (*a*)).

In order to give concrete meaning to the standard of economic good neighbourliness, the Agreement provides for co-operation between signatories on two different levels. Primarily, contracting parties are under a legal obligation to consult with the other signatories who are most directly affected by any unilateral action on their part. In addition, the contracting parties acting jointly and described in the Agreement as the Contracting Parties—in capital letters—(Article XXV (1)), are endowed under the Agreement with far-reaching functions.

The general principle of consultation with other contracting parties in all matters affecting the operation of the Agreement is laid down in Article XXII. More specific duties are undertaken by the signatories in a number of provisions. They may be summarised under four headings:

Firstly, to give information to interested contracting parties (Article XIII (8) (*a*) and (*c*));

secondly, to review the operation of laws at the request of interested contracting parties (Articles VIII (2); IX (5) and XXIII (1));

thirdly, to consult with interested contracting parties (Articles II (5); XIV (4) and (6) (*b*); XVI and XX (ii) (*c*));

fourthly, to negotiate with interested contracting parties (Articles II (5); III (4) (*a*) and IV (*d*)).

In cases in which diverging interests of members cannot be adjusted by means of direct settlement, collective action by the contracting parties—ultimately to be replaced by the organs of the International Trade Organisation—comes into play. The contracting parties are to meet from time to time in conference. It is the purpose of these meetings to facilitate the operation, and to further the objectives, of the Agreement and to give effect to the provisions of the Agreement which involve joint action. Each contracting party has one vote and, normally, decisions are taken by a majority of the votes cast. A waiver of obligations of contracting parties, which is not specifically provided for elsewhere in the Agreement, requires a two-thirds majority of the votes cast, and such majority must include more than half of the contracting parties (Article XXV).

The functions of the Contracting Parties are mainly those of a co-ordinating and supervisory body.

Under the heading of co-ordination may be mentioned the duties of contracting parties to report on measures contemplated or taken

which are likely to affect other contracting parties (Articles VII (1); X (3) (*c*); XIV (2) and (3) (*b*) and XVI) and to consult and negotiate with the contracting parties (Articles XII (4); XIII (4); XVI and XIX (2)). The right of the contracting parties to initiate discussions between contracting parties (Article XII (5)), too, falls in this category. Still more important are the supervisory tasks of the contracting parties. They extend from supervision of the observance of the main principles of the Agreement (Articles VII (4) (*c*); XIV (3) and (6); XVIII (6); XIX (3) and XX (2) (*c*)) *via* the right of granting the waiver of specified obligations—and in exceptional circumstances, of any obligation—undertaken by contracting parties (Articles VI (5); XII (3) and (4) (*d*)); XXIII (2); XXV (5) and XXVIII (1)), to revisory functions in the interest of orderly economic change (Articles XVIII and XXIV (3)) and of the adaptation of the Agreement to changed conditions (Article XXX).

The Geneva Agreement presents an important step in the evolution of international economic law and its standards. It marks the transition from bilateralism to the establishment of an international economic framework of a multilateral character. The effect of the Agreement is to limit—however slightly—economic sovereignty by the silken cords of *pacta de contrahendo;* to give guidance to the contracting parties jointly and severally by means of a hierarchy of standards and to strengthen the machinery of international economic institutions by the creation of an international economic organ not condemned merely to study, report and recommend, but authorised to act and decide.

THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT

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[The Editors invite contributions from readers of the *I.L.Q.* on the Convention dealt with in this article, either on its international aspects or with respect to its impact on the development of private international law in this country.]

The International Civil Aviation Organisation (ICAO), at its Second Assembly held in Geneva in June 1948, approved a Convention on the International Recognition of Rights in Aircraft. This Convention was opened for signature at Geneva and was immediately signed by fourteen States including the United Kingdom.[1] The purpose of this Article is to give an account in general terms of the scope and objects of the Convention and to attach to the official text a detailed commentary on its provisions.[2] It is hoped that this treatment may be useful for two reasons. First, the Convention is one of unusual complexity; it is probably correct to say that the drafting of it has been the most elaborate task of international legislation in the field of private law ever attempted. It attempts to deal, internationally, with a province of law which, within any single national legislative unit, is of unusual difficulty, namely, the effect and priority of charges on moveables, and to do so in the face of a wide divergence of national conceptions. It attempts both to provide practical solutions for problems altogether new—the problems of the

[1] The writer was, together with Sir Frederick Tymms (the leader of the United Kingdom Delegation), privileged to sign the Convention on behalf of H.M. Government. Previously, he was a member of CITEJA from its reconstitution after the Second World War, until its absorption in the Legal Committee of ICAO, and then a member of that Committee. He has been a member of all Drafting Committees and working groups on this Convention, except one from which he was unavoidably absent and believes that the opinions here expressed as to the interpretation and intentions of the Convention reflect fairly the opinions of those Committees and Groups. Wherever possible, they are based directly upon official Minutes. They have, it should be made clear, no official authority.

Reference to Minutes are (except where otherwise stated) to the Minutes of the Legal Commission of the ICAO Second Assembly. These are, at the time of writing, subject to final correction.

[2] For an historical account of the antecedents of this Convention, see *I.L.Q.* Vol. 1, p. 509.

secured financing of fleets of aircraft for international trade and international use—and at the same time, if not to solve, at least to avoid embarrassment by questions of conflicts of laws in a field where those questions are more than elsewhere debated and unresolved. Secondly, the Convention appears likely, from the attitude of national delegations in Geneva, to secure fairly wide acceptance. In that event, and taking into account the progressive increase in civil aviation, the detailed application of the Convention to individual cases may soon become a severely practical matter. The value of modern aircraft, and the extent of claims which may be made against them, will in many cases be fully sufficient to justify litigation or at least will call for the provision of exact legal advice. To those approaching the Convention for the first time it is hoped that what follows may provide at least some initial clarification.

I

In the first place it is necessary to explain briefly what were the motive forces which, in so short a time, impelled nations to agree upon this Convention and at the same time to indicate the practical requirements which the Convention is designed to meet. The initial research work which was done on the subject by the CITEJA was largely theoretical, and because this was so, the draft Conventions prepared by that body in 1931, were not further proceeded with before the Second World War. Even before the end of the War, however, powerful commercial interests, especially in the U.S.A., were beginning to urge that international legislation on the subject was of pressing importance; a resolution was passed at the 1944 Chicago Conference on Civil Aviation calling for further study, and as soon as international conferences could be resumed after the war this question took a prominent place on the agenda. The developments which had brought this about were the enormous actual and potential growth of international aviation, together with the expansion of the export trade in aircraft of certain nations and particularly of the U.S.A.

Both of these developments raised in an urgent form the question of the international validity of charges on aircraft. The powerful corporations which engaged in international air traffic desired to add to their aircraft on credit terms; clearly the necessary credit would not be forthcoming unless the financial institutions concerned were secured in some way when the aircraft, whose purchase they had financed, were abroad. Equally, foreign airlines desiring to equip themselves with modern U.S. (or British)

aircraft, would in many cases desire to do so upon credit and here again the lenders, who would normally be nationals of the exporting country, would desire protection when the aircraft passed on to the national register of another State. These commercial requirements are readily appreciated and need not be enlarged upon; the next step was to consider how they might be met.

At first sight the solution appeared to be to devise an internationally acceptable standard, or treaty, form of charge on aircraft which could be applied in all cases, wherever the charge was created, and which could pass with the aircraft, whatever changes of nationality the aircraft might undergo. The advantages of such a solution would have been very great. But it was soon found to be unattainable, at least for the present. First there was no precedent for such a standard form in any other field; neither in maritime law nor in railway law had this problem been faced and solved. Secondly the divergence in national conceptions was so great as to make the devising of such a standard form impracticable without a prolonged period of further study and discussion, whereas the problem was an urgent one. The United States had a highly developed technique of airline finance, evolved by practice and by analogy from railroad finance (for further details see below): it was not prepared to throw overboard a system which was serving well in practice for the uncertainty of an untried and undeveloped method. Other nations could be divided into two categories. The first, which included the United Kingdom and the majority of other States, had not yet formulated their own domestic law of charges on aircraft: the second which included France, Italy and some South American countries, had their own national laws on the subject which conformed, naturally, with the rest of their respective legal systems. While the first category might have been readier than the second to accept some international system created *de novo*, neither could be expected to engraft on their own immature national legislations on the subject the elaborate constructions of United States lawyers.

It was thus apparent that the way was not open for the preparation of a Convention of *unification* of international law; and if this were so the only alternative was a Convention of *recognition*. It was necessary to start from the position that individual States would maintain or create their own individual conceptions and laws of charges on aircraft, and to devise some means of securing the recognition of those charges in other States. The problems raised by such an approach were therefore essentially 'conflict' problems, and it is the student of conflict of laws who will mainly find interest in the Convention both in the solutions

it attempts to provide and, perhaps, even more in the problems which it raises and does not solve.

II

The basic objectives of the Convention can be said to be four :—

(a) The protection of secured creditors who have lent money on the security of aircraft.

(b) The protection of third parties dealing in or with aircraft against hidden charges.

(c) The definition and protection of 'privileged' or 'priority' claims against aircraft.

(d) The facilitation of the transfer of aircraft from one nationality to another.

A brief description of the manner in which these subjects are treated will, it is hoped, assist the understanding of the Convention as a whole.

(a) *Protection of secured creditors.*

This is achieved through the express obligation, imposed by Article 1, for Contracting States to recognise specific types of rights. It will be noticed that Article 1 (1) contains an enumeration of four types of 'rights in aircraft' which fall within the obligation of recognition. An examination of each of these four types is reserved for the detailed commentary, but it may be desirable here to explain the reasons why this technique was adopted. The principal reason was the impossibility of finding any internationally acceptable form of words which would include all those rights, and only those rights, to which States were prepared to accord the recognition which the Convention contemplates. The French expression 'droits réels' was, perhaps, the single expression which most nearly corresponded to intention : unfortunately, the only English equivalent 'rights in rem' does not exactly correspond with it either in English or American law, and in any case the term would probably not cover some of the types of securities used in the United States (*e.g.*, equipment trust or hire purchase). Any more general, or vague, expression (such as 'rights relating to aircraft') encountered the objection that it might obligate States to the recognition of a wide and uncertain category of rights—for example, options or other contractual rights not giving rise to charges—the existence of which *pari passu* with other rights of a 'real' character would raise awkward questions of priority. The method of enumeration was therefore reluctantly adopted, and it was on the question of how the enumerated rights should be described that the most prolonged

and contentious negotiations took place. The terminology finally accepted in paragraphs (a), (b), (c) and (d) of Article 1 (1) represents the results of numerous compromises between differing conceptions and this accounts for the lack of elegance in drafting. It must be considered as remarkable that complete agreement should have been reached on definitions so difficult. The broad principle is to confer recognition on property in aircraft, leases of aircraft over six months, and other rights in aircraft of a security nature : the detailed interpretation of these paragraphs is dealt with in the Commentary.

Article 1 (1), then, states the rights to be recognised; the rest of the Article states the conditions of recognition; and attributes certain special effects to the recognition which States agree to give. The conditions are two : first the principle is stated that the right in question must be constituted according to the law of the nationality of the aircraft at the time the right is constituted. Leaving aside for the Commentary what is meant by ' constituted ' (*i.e.*, what aspect of the validity of the right is referred to) it is sufficient to draw attention to the unusual principle of law adopted by the Convention. The validity of a contract is in effect judged, not according to the *lex loci contractus*, or the intention of the parties, but according to the law of the State whose nationality the aircraft possesses.[3] Thus, taking a British registered aircraft, the validity of a charge, wherever made, in favour of a lender of whatever nationality or domicile (the *borrower* must necessarily be British since only British subjects can own British registered aircraft), wherever intended to be enforced, is governed by British Law.[4] Secondly, recognition is made conditional on recording.[5] The provisions of the Convention relating to the record are an essential element in the structure and must be read in detail to

[3] This may in effect be regarded as a decision to base the validity of the charge on the *lex situs* attributing to the aircraft a conventional *situs* at the place where the aircraft is registered. See an interesting discussion of this problem by Calkins, *Journal of Air Law and Commerce*, Spring 1948, who, however, did not regard this as a possible alternative.

[4] The expression " law of the State where the aircraft is registered as to nationality ' appears to give rise to difficulties in the case of federal constitutions since, while registration is a central matter, the law governing charges is normally a province or State matter. Some of the difficulties of ascertaining which State law ought to be applied to the ' constitution ' of charges in the U.S.A. are discussed by Calkins, *loc. cit.* These appear to be very grave. In the only reported case in the U.S.A., the recorded charge was constituted in favour of the U.S.A., itself under federal statute, and was held to take priority over a State possessory lien. (Matter of *Veterans' Air Express Co.*, *U.S.Av.R.*, June 1948, p. 173).

[5] The term ' record ' is used throughout the Convention and it is hoped will be used in jurisprudence and practice to denote the record (or, as we should say, the register) of charges as distinguished from the register as to nationality maintained under the Chicago Convention for which the term ' register ' is reserved.

be fully understood. Here it is sufficient to draw attention to three main features. First, the Convention does not itself attempt to establish a detailed recording system or to define the exact consequences of recording. At one time indeed it was thought that this could and should be done and some elaborate Articles were drafted with the object of obliging States to set up a uniform recording system, similar to the Torrens system of land registration, and with similar provisions regulating such matters as notice, bona fide purchaser, priority, etc. This was, however, found to be impracticable, principally because certain countries, notably the U.S.A. and France, had already established their own recording systems on different lines and were not willing to recast these in favour of a more rigid and exacting régime. The Convention therefore adopts a different method. It does not oblige any Contracting State to maintain a record at all : the decision to do so or not is left to each State to make in the light of its own commercial needs. All that the Convention does is to provide that if one Contracting State maintains a record, then other Contracting States are obliged to give recognition to rights entered upon it. It was felt that, in practice, most if not all Contracting States would themselves maintain a record in their own interest : a State would hardly sign and ratify the Convention merely for the purpose of assuming the obligation to recognise rights entered upon the record of another State. If it did so, it would surely be with the object of gaining recognition and protection for the rights of its own secured creditors, and if that were so the first step would be to establish, itself, a record.[6] It will soon be demonstrated whether this argument was correct.

Secondly, the Convention does not contain any provisions regarding the effect of recording other than those provisions which oblige a Contracting State to recognise a right duly recorded (Article 1 (1)) and not to admit or recognise any right taking priority over a recorded right (Article 1 (2)). All questions of the priority of recorded rights *inter se* (*e.g.*, whether they should take priority according to date of recording) and all questions regarding the regularity of recording (recordings obtained by fraud, rectification, mistake, etc.) are left to be governed by the law of the State which maintains the record.

Thirdly, it is important to appreciate that recordings relating to any given aircraft must all appear in one record, and that must be a record maintained by the State whose nationality the aircraft

[6] Mr. Justice Alten, the distinguished delegate of Norway, who was Chairman of the Drafting Committee, said that a Contracting State which did not maintain a record would be ' a Contracting State of the Moon '. (Minutes fourteenth meeting.)

possesses; it would not be possible, for example, for a charge on a British aircraft, even though this were in American form and created in the U.S.A., to be entered on the United States record; it could only be entered on the British record. Coupled with this is the provision (Article 2 (3)) that States may prohibit the recording of rights which cannot validly be constituted according to their national law. This would enable the British authorities to prohibit (if they so desired) the entry of an American charge on the British record.

The special effects to be attributed to recognitions under the Convention are stated in Article 1 (2) and Article 9. These are of course cardinal, since a mere obligation to recognise would not take the matter much further than it is already taken under the general principles of private international law.

Under Article 1 (2), once a valid charge, of the specified character, is entered on the appropriate record, no other right can be given priority over it. This provision is vitally important: it means in practice that if, for example, a British exporter of aircraft raises money from a British bank on the security of the aircraft to finance the manufacture of the aircraft, and then sells the aircraft, subject to the charge, to a United States company and secures recording of his charge in U.S.A., he is protected against the possibility that a French court might confer priority over his charge on any unrecorded claim against the aircraft, *e.g.*, a second mortgage or a claim for French taxes (see below, p. 442, as to the position of a United States court). The only exception to this rule is in the case of a 'privileged' claim of the type mentioned in Article 4 (see below (c)).

Next, by Article 9, the secured creditor is protected against the transfer of the aircraft to another State where his charge might not be recognised. It is easily seen that a simple method of defrauding secured creditors would be afforded by the possibility of selling the aircraft to a foreign subject, and quite apart from cases of fraud the position of a secured creditor might be prejudiced in many ways by such a transfer. The transferee State might, for example, not maintain a record on which the charge could be entered; or, if it did, it might refuse to admit the charge to recording as contrary to its national law (see Article 2 (3)); or even if it admitted the charge to recording, the effect of recording might be less favourable than it was in the transferor State. For all these reasons it was thought expedient to provide, by Article 9, that a transfer cannot be made to another national register or record unless the holders of all recorded charges have been satisfied or consent to the transfer. For further discussion of this

controversial Article the reader is referred to the Commentary : it may be noted here that the Article does not, and of necessity could not, prevent a transfer of an aircraft subject to a charge to the national register of a non-contracting State and such a transfer might operate in prejudice of secured creditors.[7]

(b) *Protection of third parties.*

It is manifestly desirable that persons wishing to deal in aircraft, or to advance money on the security of aircraft, should be able to do so confidently, without the fear that after they have parted with their money a secured creditor may present himself and claim to be entitled to a charge. In earlier drafts an attempt was made to confer this protection by means of an Article providing in terms that purchasers in good faith dealing in aircraft on the faith of the record should take a good title free from any unrecorded rights. Later drafts, and the Convention as adopted, contain no such clause, it having been impossible to obtain agreement on such terms as ' purchaser ' or ' good faith ', or as to the effect of notice or the lack of it. The approach which was ultimately adopted to this problem was in fact strictly practical : it was to consider concretely what classes of persons it was desired to protect and then to see how each such class could be protected. First, there is the case of a person who wishes to lend money on the security of an aircraft and to be sure that he gets a first charge. His position, it was thought, would be secured by recording his charge and by the provision of Article 1 (2) which prevented the recognition of any charge in priority to his. Theoretically, he could still be defeated if a third party who had a prior (unrecorded) charge were to record his charge and if the law of the State concerned were to provide that such a charge might have priority. It was felt, however, that this unlikely contingency could be met through the examination which every prudent lender would make into the law of the State on whose record he proposed to rely.[8]

[7] Article 9 in fact, was, until the very last stages of the progress of the Convention, drafted so as in terms to forbid a transfer (without consent or satisfaction of secured creditors) even to the register of a non-Contracting State. Although such a provision was necessarily, to some extent, unenforceable, a number of States desired its retention as giving some extra protection, or appearance of protection, to secured creditors. It was only deleted, at the insistence of the U.K. delegation, at a late sitting and by a narrow majority, the reasons given being that it would lead to formidable administrative difficulties since a situation might arise when an aircraft had validly been transferred to a foreign national and yet the State of the transferor would still be obliged to keep the aircraft on its nationality register and so expose itself to liability under the Chicago Convention.

[8] This examination is in any case indispensable because of the combined effect of Articles 1 (2) and 11 (see below, Commentary on Article 1 (2)).

Secondly, there is the case of a person who wishes to buy an aircraft and to be sure that he acquires it free from encumbrances. This case, it must be admitted, is not very clearly dealt with by the Convention. It is probably intended to be covered in the same manner as the previous case, namely, through recording in the vendor's State, transfer to the record of the purchaser's State and reliance on Article 1 (2) so as to prevent recognition of any right taking priority over the purchaser's right of property. It is true that a charge does not, in normal English terminology, 'take priority' over the property in the thing charged: that, it does so, within the meaning of the Convention, is, however, indicated both by the fact that the right of property in aircraft is enumerated (Article 1 (1)) as a right in an aircraft *pari passu* with other rights, including charges; and by the French text of Article 1 (2) ('aucun droit préférable à ceux énumérés au paragraphe (1) du présent Article') which beyond question prevents the recognition of a charge which would affect the property.[9] In the main, therefore, the purchaser appears reasonably protected, and although there are other possible defects in the protective system (examination of which would unduly prolong this Article), in practice it does not seem likely that trouble will arise. If a record exists, every owner of a charge is, in the interest of his own protection, certain to comply with the requirements precedent to the recording of his charge and to record it; the existence of unrecorded charges can be regarded as an unlikely hypothesis.

Lastly, there remains to be mentioned under this heading the case of 'privileged' or priority charges—the most important being for salvage of the aircraft—see next paragraph. Here it will be seen that Article 4 contains detailed provisions designed to prevent these subsisting as hidden charges and emerging to embarrass a purchaser. In fact they lose their international validity unless they are recorded within three months. A purchaser, therefore, who searches the record, has only to fear 'privileged' charges created within the last three months: and it is thought—surely with justification—that if any charge of this character arose within the last three months it would be most unlikely that, having regard to its nature and the circumstances

[9] The use of the word 'priority' in this sense was criticised by Mr. J. C. Cooper, observer from IATA. After the Chairman of the Commission had characterised this criticism as one of the drafting of the English text and the Chairman of the drafting Committee had stated that the word 'priority' had the same meaning as the word 'préférence', there was no dissent from this view and therefore a tacit acceptance of the opinion that the word was meant to have the meaning here ascribed to it (see Minutes, fourteenth meeting).

in which it can only arise, *i.e.*, of some extraordinary emergency in which the aircraft was involved, it could escape a purchaser's notice.

(c) *Privileged or priority claims.*

The question in this connection was whether and to what extent there should be recognised in relation to aircraft liens analogous to maritime liens, the international recognition of which was provided for in the Brussels Convention of 1926. It was, of course, plain at the outset that many of the circumstances which may justify the creation of a lien in the case of ships do not apply to aircraft. Thus there would be no case for conferring a lien upon obligations entered into by the captain of the aircraft, or upon the wages of the crew. The position of the captain of an aircraft, whose voyage is completed in a matter of days and who is in continuous touch with his operator-employer, is very little analogous to that of a ship's master. Generally, it was felt that the number and extent of liens to be given priority over security charges should be limited to the greatest possible extent : the possibility that a security charge might at any moment be postponed to a wide class of claims of unlimited amount would, it was felt, seriously interfere with the granting of credit. In the result, priority over security charges is only conferred where an expense is incurred directly in the interest of the preservation of the security : it is in fact limited to salvage claims and ' extraordinary expenses indispensable for the preservation of the aircraft '. The strong language used in defining the second type of priority charge should be noticed : it was generally agreed that only something quite exceptional should qualify. For a discussion on the meaning of the word ' salvage ' the reader is referred to the Commentary on Article 4 (1).

These two categories of claims are, then, the only claims which may be given priority over recorded security claims. Mention should, however, be made here of a third category which at one time appeared in the Convention, whose final exclusion was only agreed after numerous and prolonged discussion, and the omission of which may seriously prejudice the chances of acceptance of the Convention by certain States. This third category was that of claims by the State, or fiscal claims, to which an important body of States desired to give equal priority with the others. In favour of this contention it was pointed out first that the Brussels Convention conferred priority upon certain classes of fiscal claims, and secondly that States could not be expected to accept a Convention which not only did not make provision for their claims

to be met but in terms excluded them—by Article 1 (2). Some States were able to point out that it would be unconstitutional for them to take this course.

As against this point of view, it was argued that to confer priority upon State or fiscal claims would destroy the whole utility of the Convention. No lender would be prepared to advance money if he were exposed to the risk of a priority claim being asserted by a foreign State. If the door was once opened in principle to such claims, it would be impossible to keep them within bounds. Admittedly, it was said, States have legitimate claims against aircraft, but States are not a class of creditor which needs especial protection. A State always has means at its disposal of enforcing its legitimate claims : in particular it can always make such stipulations as it requires for its protection on the conclusion of bilateral agreements or the granting of special permission under which aircraft of another State are admitted to its territory. The argument was finally used, that to grant priority to fiscal claims would be contrary to the general principle of non-enforcement of such claims in international law.

These arguments finally prevailed. In Brussels, where the Convention was approved by the Legal Committee of ICAO, the vote was ten States in favour and five against and, on second reading, nine against seven. In Geneva, after prolonged discussion, the voting was fourteen against twelve.[10] This represented the only serious difference of opinion of all the many contentious problems discussed in the course of negotiations.

(d) *Facilitation of transfer of aircraft.*

This is included as one of the basic objects of the Convention for the reason that it was singled out for mention by the Chicago Conference of 1944. Resolution No. 5 adopted by the Conference in fact called for study to be resumed on the two draft Conventions prepared by CITEJA in 1931 with a view to adopting a Convention ' dealing with the transfer of title to aircraft '. These Conventions, and earlier drafts of the Geneva Convention, did in fact contain a number of provisions of an administrative character for carrying out the transfer of aircraft from the nationality register and the record of one State to those of another. In conformity with the general plan ultimately adopted, that the Convention should deal with broad principles of recognition and that details

[10] That the voting was so close on this occasion may be attributed to the fact that the Portuguese delegation proposed certain fairly substantial limitations upon the State's power to prefer its fiscal claims. Should the question ever come up again, these should receive consideration (see Minutes, ninth meeting).

of administration should be left to national laws, these provisions were dropped and the Convention therefore now contains no defined machinery for facilitating the transfer of aircraft. The Chicago resolution has, however, been implemented through the system of recording which is introduced and through those provisions referred to in para. (b) above which give protection to purchasers who acquire aircraft in reliance on the record.

III

Mention should now be made of two special problems which had to be faced in the drawing up of the Convention and of the manner in which the Convention attempted to deal with them. Both are peculiar to civil aviation and do not arise in maritime law. The United States law and practice relating to railroad stock has afforded some guidance on the first.

(a) *The problem of 'fleet mortgages'.*

Under any system of operation, a substantial air carrier, whether he is operating a 'scheduled' or a 'non-scheduled' service does not work with, or acquire, single aircraft, but with a number or 'fleet' of aircraft of a similar type, purchased from a single manufacturer. In some cases the whole fleet will be ordered at one time, in others it will be gradually built up and orders placed for more aircraft as developments proceed. In either case secured finance will be required and this will be obtainable on better terms if the lender can be given security over the whole of the fleet. The 'fleet mortgage' has been used for this purpose for a number of years in the United States with success. Under it financial institutions are willing to lend up to 80 per cent. of the value of the aircraft, whereas on single aircraft they would lend considerably less. The security given is a charge over the whole fleet: this charge is not a floating charge in the sense that aircraft can come into and go out of the fleet, but a fixed charge on the identified aircraft forming part of the fleet. At the same time any individual aircraft is, during the currency of the mortgage, subject to a charge for the whole amount raised, *i.e.*, to a charge for an amount many times its own value.

It is this circumstance which has given rise to difficulty: for many States have been unwilling to accept a position in which an aircraft subject to such a charge, *i.e.*, one in which no 'equity' exists, comes into their territory: the result is, it was said, to make the aircraft extra-territorial so far as local creditors are concerned and to deprive the latter of any remedy for legitimate claims.

Recognising the force of this objection, the Legal Committee of ICAO at one stage proposed that in such a case, *i.e.*, where a claim was made against an aircraft by a foreign creditor on foreign soil, the fleet mortgage should be apportioned among the fleet so that the individual aircraft involved would be considered as charged only with an aliquot portion of the total : this would ensure that at least some equity was available for local creditors. It was claimed, however, that this method would unduly prejudice the security, would destroy the value of the fleet mortgage or would at least have the effect of reducing substantially the amount which lenders were prepared to advance—to the detriment of airline financing and of the development of civil aviation. An analysis was therefore undertaken of the categories of local creditors who might be affected with a view to estimating the extent of the injustice likely to be caused by enforcement of the fleet mortgage and to providing the appropriate remedy. Such an analysis at once disclosed a distinction between ' voluntary ' creditors and ' involuntary ' creditors : the former being persons who entered into contracts with the operator of the aircraft, *e.g.*, for the supply of fuel or for repairs, and the latter persons suffering damage through the operation of the aircraft. With regard to the former, it was considered that a principle of ' caveat venditor ' applied : it was always open to such persons before supplying goods or services to demand cash payment or, if credit was required, to have the record searched. It was the latter class, and particularly persons suffering injury or damage to property through the aircraft, whose claims ought to be protected.

To meet this requirement the provisions of Article 7 (5) were finally devised : these are unusually complicated and it must be left to the Commentary to attempt detailed elucidation. Broadly they amount to this : that claims of this character should normally be met by insurance cover (it will be remembered that the Rome Convention of 1933, which has not yet been adopted by any considerable number of States, makes such insurance obligatory) : if they are not so met, then it is open to the State where the injury or damage is caused, to provide by its law that, as against a person setting up such a claim, the fleet mortgage shall only be asserted to the extent of 80 per cent. of the amount realised on sale of the aircraft. In other words, a person who or whose property has suffered damage from a foreign aircraft encumbered by a fleet mortgage is, in proceedings against that aircraft or—an interesting addition—against other aircraft of the same fleet, sure of an ' equity ' of 20 per cent. of the value of the aircraft for the enforcement of his claim. Whether or not this provision is used

in practice, the elaboration of it, in an International Convention, must be regarded as a remarkable achievement of compromise and of drafting.

(b) *Spare parts.*

An essential element in a fleet of aircraft is the availability of a plentiful supply of spare parts and the order for such spare parts is invariably involved in the order for the fleet. The value of these, including as they do such expensive items as spare engines, propellers and electrical equipment, is considerable and can be taken to amount to something of the order of 20 per cent. of the value of the fleet. Finance is therefore required for the provision of these spare parts and effective security must be capable of being created upon them : this must take account of the fact that the spare parts are not all retained centrally but are, of necessity, distributed and held in depots abroad at points along the routes of operation. The provision of such security clearly raises formidable problems : the admission of a charge upon chattels, of a numerous and miscellaneous character and liable to frequent substitution, raises all the questions which have from time to time been faced, but far from solved, in the Bills of Sale Acts and the numerous cases upon the Acts. The majority of these problems the Convention has not attempted to resolve : it has not attempted in any way to unify or define the law of charges upon chattels ; consistently with its general framework it has concentrated upon the question of recognition.

The matter is dealt with in Article 10. The Article starts from the basis that it is for national laws to establish the conditions upon which a charge can be created over spare parts and proceeds to provide for international recognition of such charges. Such recognition is given upon strictly limited conditions : first the charge on the spare parts must have been created as an extension of a charge upon aircraft : a charge upon spare parts alone is not protected. Secondly, recognition is only afforded of the charge provided that the spare parts are stored in ' specified ' places, *i.e.*, in places specified upon the record and provided that, at the specified place, a statement is exhibited giving due notice to third persons of the existence of the charge. Thirdly, it is stated that the spare parts may be replaced by ' similar parts ' without affecting the rights of the creditor. Fourthly, the charge must be recorded. Fifthly, the Article contains an elaborate provision designed, as the similar provisions referred to immediately above, to protect the rights of local creditors. The method here adopted is to permit the local judicial or administrative authorities, who are concerned with the enforcement of the rights of local creditors, to limit the

secured charge to two-thirds of the sum realised on a sale of the spare parts, in other words to reserve an 'equity' of one-third for the local creditors. Further explanation of this Article is reserved to the Commentary.

IV

It remains to indicate briefly the probable future development of this Convention and of the branch of Air Law with which it deals.

The first step, after ratifications [11] have been obtained is for the necessary national legislation to be passed. Although some States (notably the U.S.A. and France) already have a well-developed law on many of the matters with which the Convention deals, the Convention introduces conceptions which are in most cases novel and in many cases definitely opposed to existing conceptions, and it can be stated with certainty that no State will be able fully to implement the Convention without passing some fairly comprehensive legislation. In the case of the United Kingdom—and this may be an advantage—it will be necessary to start *a tabula rasa* and to build from the foundations a law of mortgages of aircraft. National delegations at Geneva fully appreciated these necessities and the efforts made to agree upon the Convention demonstrated that the necessary goodwill at least was not lacking. But it will be the pressure of commercial requirement—whether to increase the export of aircraft, or to acquire modern fleets of foreign aircraft on easy terms—which will be the decisive factor in securing ratifications.[12]

Finally, it was fully recognised at Geneva that this Convention —the best that could be achieved in the time—is but a stage in the development of an effective system of international protection for securities on aircraft. At the final session a resolution was passed calling for further study and indicating the hope that a uniform standard form of charge can be devised which will be entitled to automatic acceptance and enforcement. The International Law Association has already taken steps to have this study made, and it is to be hoped that it may lead to fruitful results.

NOTE :

It is impossible to understand many provisions of the Convention without some knowledge of methods of charging aircraft used in the United States. The following note contains a brief summary of the most important in use.

[11] Two ratifications are sufficient to bring the Convention into force.

[12] It is noted that the important Brewster report on U.S. National Aviation Policy, urges the Department of State to secure the adoption of the Convention by all nations to which U.S. carriers fly (Senate Report No. 949, para. 34). Prompt ratification by the U.S.A. is also urged by the Finletter Commission report to the President (*U.S.Av.R.*, June, 1948, p. 424).

(i) *Chattel Mortgage.* This consists of an assignment by way of mortgage of one or more aircraft as security for an advance. It usually contains a covenant to assign any after-acquired aircraft. The assignment extends to spare parts which are identified by an attached list. The mortgagee has a power of sale on default. Notwithstanding the use of the word 'assign' (or other similar words such as 'grant', 'convey', 'transfer') there is some doubt whether the title remains in the mortgagor or passes to the mortgagee, the decision depending on State Law. Equally, there is uncertainty which State Law applies in the case of conflict, the *lex loci contractus*, *lex loci solutionis* or *lex situs*.

(ii) *Conditional Sale.* Here the lender pays the manufacturer and takes over the latter's position against the purchaser. The property remains in the lender (he is described as having a 'bare security title') and passes to the purchaser upon payment of the purchase price.

(iii) *Equipment Trust* (*Philadelphia Plan*). This form of transaction can be divided into two parts. First, as between the lender or lenders and the borrower the transaction closely resembles a hire purchase agreement. The title to the aircraft is in the lender who leases them to the borrower. Upon payment of the full purchase price (together with interest, costs, etc.), the lender transfers the property to the borrower. Further, during the currency of the lease, the borrower can procure the release and transfer to him of individual aircraft upon paying a fixed 'release price'. The lease extends to spare parts which are listed.

Secondly, as between the lender and the persons who provide the finance (*i.e.*, the public) the lender is in the position of trustee and issues certificates to the subscribers. In this respect, in fact, he resembles a trustee for debenture holders. It is this part of the transaction which gives it its name, but for the purposes of the Convention it is only the first part—as between lender and borrower that matters.

The documents in which these transactions are embodied are exceedingly elaborate. A skeleton draft before the writer runs into thirty-eight closely printed pages.

TEXT AND COMMENTARY

CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT

Whereas the International Civil Aviation Conference, held at Chicago in November-December 1944, recommended the early

adoption of a Convention dealing with the transfer of title to aircraft,

WHEREAS it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognised internationally,

THE UNDERSIGNED, duly authorised, HAVE AGREED, on behalf of their respective Governments, AS FOLLOWS :

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ARTICLE 1	
(1) The Contracting States undertake to recognise :	The 'recognition' which States agree to give is something more than the recognition normally accorded under the principles of international law to rights regularly established, since it carries the consequences stated in Article 1 (2) *ad fin* : Article 1 (2), first phrase, preserves the general principle of recognition under private international law.
(a) rights of property in aircraft ;	The inclusion of 'property' among the rights here enumerated is designed to enable purchases of aircraft from recorded owners to be made without fear that the title may be encumbered. The only encumbrance (other than a recorded encumbrance) by which such a purchase could be affected would be one of the type mentioned in Article 4 arising within the last three months (see p. 429 above).
(b) rights to acquire aircraft by purchase coupled with possession of the aircraft ;	This is intended to apply to the purchaser under a 'conditional sale' or an 'equipment trust' (see note above on U.S. methods of charging). In these cases the chargee is recorded as the 'owner' but the document establishing the 'conditional sale' or 'equipment trust' would also be on the record. It would therefore not be possible

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	for the 'owner's' title to be divested (whether by voluntary contract or by process of execution) without account being taken of the purchaser's rights. The purchaser (who is in fact the operator of the aircraft) would of course be in possession. The requirement of possession is made in order to exclude the case of a mere option to purchase not coupled with possession.
(c) rights to possession of aircraft under leases of six months or more;	An 'equipment trust' normally contains a lease, which would be for longer than six months, in favour of the purchaser. This clause gives protection to such a purchaser and also to a 'straight' lessee under a hiring agreement.
(d) mortgages hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;	The French, English and Spanish texts all refer, without translation, to 'mortgages' and 'hypothèques', the philosophy of the Convention being to leave each State free to develop its own law of charges on aircraft. 'Contractually' — to exclude charges which arise by operation of law, *e.g.*, the married woman's 'hypothèque'. 'Indebtedness' not 'debt' so as to ensure that charges for an uncertain amount (*quod certum reddi potest*) are included. The French 'dette' and Spanish 'deuda' have this meaning.
Provided that such rights (i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and	The law here made applicable is the law of the Contracting State in which the aircraft was registered at the time the right was constituted. The question whether this means the 'internal' or 'domestic' law or whether it includes the rules of

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conflict of laws applied in the State is one which evoked much discussion. Specific proposals (a) to add the word 'internal' (b) to add the words 'including the rules of conflict of laws' were both rejected. On the final reading the Chairman of the Drafting Committee, after referring to this double rejection, said 'The consequence was that the Brussels text remained as it stood and this was satisfactory. The "Law of the State" was an expression wide enough to govern not only written law but customary law in all fields affecting the rights of aircraft with which the Convention was concerned'.[1] The result seems to be that States may apply their rules of conflicts of laws if they think fit.

This law governs all questions of formal and essential validity of the rights. It is also this law which, it is thought, governs the question at what time a right is deemed to be constituted (*e.g.*, on signature, or on recording).

Thus, if the aircraft is registered in U.S.A. and (as may happen if it is intended to sell it to a U.K. owner) a charge is negotiated in U.K., the applicable law is U.S. law. (Query which State?). This may, or may not, decide to apply English law to the question whether the charge is valid. Even if the aircraft is subsequently transferred to the English register, the applicable law will still be U.S. law. It will be noted that no solution is provided in the case

[1] Minutes, fourteenth meeting.

TEXT	COMMENTARY
	where the aircraft is not registered at the time the right is constituted —a case which may often arise. The choice would appear to lie between the proper law of the contract and the State of the first registration.
	So far as the effect of the rights is concerned, *i.e*, the construction and effect of the document creating the right, the Convention is silent; the consequence is that this is left to be governed by the general rules of law. As to effects with regard to third parties, see Article 2 (2).
	If a separate nationality register is maintained in any territory for the foreign relations of which a State is responsible (*e.g.*, a colony, protectorate, territory under trusteeship) the applicable law is the law of that territory (see Article 17). This provision may be useful within the British Commonwealth.
(ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.	Unless the right is recorded there is no recognition under the Convention (but see on Article 1 (2)). It is evident therefore that recognition under the Convention only takes effect as from the date of recording.[2]
	'a' public record, because a State may maintain more than one record.
The regularity of successive recordings in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to	Successive recordings are referred to, to cover the case where aircraft are transferred from one record to another. What is meant is that the validity of each recording is determined by the law (in

[2] It was because the Commission was clear on this point that it rejected an Indian proposal to insert an express provision to a similar effect (Minutes, fifth meeting).

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nationality at the time of each recording.

(2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting States; but Contracting States shall not admit or recognise any right as taking priority over the rights mentioned in paragraph (1) of this Article.

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this case the internal law)[3] of the State where that recording is made.

The first phrase merely preserves the general rule of international law. Thus, many owners of aircraft, especially private aircraft, may never record the ownership of their aircraft. Nevertheless other States would recognise that ownership and any transfer of that ownership. Equally, if the ownership of the aircraft were not recorded, and the aircraft were subject to a lease or to a charge which was not recorded, this lease and charge would normally be recognised.

Once a right (of the kind referred to in Article 1 (1)) is recorded Contracting States may not recognise any right taking priority over that recorded right. Since property is such a right, they may not recognise an unrecorded charge since such a charge would be considered as taking priority over (French préférable à) the recorded right.[4]

'admit or recognise.' These words are important. 'Recognise' prevents a State from allowing any other foreign right priority over a recorded right: 'admit' from granting such priority to a right claimed under its own domestic law, *e.g.*, a fiscal claim. It will be noted that this paragraph does not apply where the aircraft is registered in the State where the question arises, (see Article 11).

[3] Minutes, fourth meeting.
[4] See above p. 429.

TEXT	COMMENTARY
	Thus there is nothing to prevent an Irish Court giving priority to a fiscal claim by the Irish Government over a recorded charge against an Irish aircraft, even though the owner of the recorded charge is British.[5]
Article 2	
(1) All recordings relating to a given aircraft must appear in the same record.	This record must be maintained by the State where the aircraft is registered as to nationality (Article 1). There is nothing to prevent a State (Proviso (ii)) maintaining more than one record, but all rights must appear in a single record. Interested persons (*e.g.*, intending purchasers and mortgagees) can find out which is the appropriate record by inspecting the certificate of registration which has to be carried on the aircraft (Article 3 (1)). They would then only have to search this one record.
(2) Except as otherwise provided in this Convention, the effects of the recording of any right mentioned in Article 1, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.	'Except as otherwise provided' —*e.g.*, in Articles 1 (2), 4 and 6. This means that all questions of priority of rights (recorded or not) are governed by national laws. Normally, priority will be governed by date of recording, but some countries (*e.g.*, Switzerland) desire to be able to provide that a subsequently recorded charge may in some cases have priority over those previously recorded.
(3) A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law.	This is designed to enable States, on a transfer of aircraft, to refuse to accept on their record a right constituted in and according to the laws of a foreign State. Thus a U.S. registered aircraft may be

[5] This result was clearly intended by the Commission (see Minutes, sixth meeting).

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subject to an equipment trust. On a transfer of this aircraft to the Argentinian register, it may be desired to prevent the placing on the Argentine record of the equipment trust as contrary to Argentine law.[6] Once admitted to recording all questions as to its validity must be determined by U.S. law (Article 1, Proviso (i)).

It is intended that rights may freely be transferred to records of other States in all cases where there is not an actual prohibition in the law of one of such States. It is not contemplated that a right should be excluded by the mere decision of an official.[7]

ARTICLE 3

(1) The address of the authority responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts of the particulars recorded. Such copies or extracts shall constitute *prima facie* evidence of the contents of the record.

(3) If the law of a Contracting State provides that

Paragraph (3) takes account of certain existing administrative

[6] This point was well made by the Portuguese delegate: 'If an aircraft of the United States, charged with a fleet mortgage, went to Argentina, Brazil or Portugal, the fleet mortgage would be respected. Only in the case where the aircraft had been sold to an Argentinian, Brazilian or Portuguese enterprise and the internal legislation of each country said that the American charge would not be recognised in regard to an aircraft which was acquiring the nationality of these countries, would the charge not be recognised' (Minutes, third meeting).

[7] Minutes, seventeenth meeting.

TEXT	COMMENTARY
the filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.	arrangements by which a document is treated as 'recorded' from the time when it is 'filed for recording', *i.e.*, delivered to the authority maintaining the record.
(4) Reasonable charges may be made for services performed by the authority maintaining the record.	
Article 4	
(1) In the event that any claims in respect of :	There is not at the present time in force any International Convention relating to salvage, the Brussels Convention of 1938 (*I.L.Q.*, Vol. 1, p. 505) not having received sufficient ratifications. This Article therefore proceeds on the basis of national law, the law applicable being, in accordance with maritime practice, the law of the place where the operations terminate. No definition is given of the word 'salvage' and there is no limitation to salvage at sea.[8] The question whether a particular operation is one of salvage will presumably have to be determined by national laws.
(a) compensation due for salvage of aircraft, or	
(b) extraordinary expenses indispensable for the preservation of the aircraft give rise, under the law of the Contracting State where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognised by Contracting States and shall take priority over all other rights in the aircraft.	It will be noted that the Article does not apply unless the operations terminate in a Contracting State : it was considered that in general nationals of a Contracting State (for whose benefit this

[8] It was proposed by the U.S. delegation that salvage in this Article should be restricted to salvage at sea. This was opposed, both by certain States with large land surfaces and by those who considered that a Convention regarding salvage on land might shortly be agreed. The U.S. proposal was defeated. (Minutes, eleventh meeting).

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(2) The rights enumerated in paragraph (1) shall be satisfied in the inverse order of the dates of the incidents in connection with which they have arisen.

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Article is introduced) would terminate the operations in a Contracting State and that there was no practical necessity to provide for the application of the law of a non-Contracting State.

Paragraph (1) is curiously conceived from a theoretical point of view. It first considers whether the law of the relevant State confers a charge. If it does, then however low the priority of such a charge, that charge is, under the Convention, given priority over all other charges. A case might therefore arise of a salvor, having brought an aircraft safe to State A (which confers a charge without priority), can gain priority by suing in State B. In practice such a situation is unlikely since claims of this kind, if admitted at all, would be given priority.

Note that this Article applies even to aircraft registered in the State in question (see Article 11). A U.S. Court would thus be obliged to give priority to a salvage claim in respect of a U.S. aircraft brought safely to a U.S. port if the salvor were a national of a Contracting State even if such a priority did not exist under U.S. law. *Aliter*, if the salvor were a U.S. citizen since no other party to the Convention would be involved.

The normal maritime rule—see Brussels Convention on Maritime Liens, 1926, Article 5.

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(3) Any of the said rights may, within three months from the date of the termination of the salvage or preservation operations, be noted on the record.	'noted on the record.' A distinction is made between this expression and 'recording', because these rights have over-riding priority under Article 4 (1)—not dependent on recording—and the condition that they shall be 'noted'—which exists so as to give notice to intending purchasers, etc.,—is one which must be fulfilled if the priority is to be retained more than three months. This paragraph gives a *right* to have a note made on the record and Article 2 (3) does not apply.
(4) The said rights shall not be recognised in other Contracting States after expiration of the three months mentioned in paragraph (3) unless, within this period,	'*shall* not be recognised'—not '*need* not be recognised'. States are prevented from recognising these rights (if not noted) so that a purchaser buying an aircraft against which no such claim is noted is free from the risk that some State may decide to recognise the claim. There is, of course, nothing to prevent the enforcement of the claim by the domestic law of the State where the operations terminated.[9]
(a) the right has been noted on the record in conformity with paragraph (3), and	
(b) the amount has been agreed upon or judicial action on the right has been commenced. As far as judicial action is concerned, the law of the forum shall determine the contingencies upon which the three months' period may be interrupted or suspended.	This is for the protection of existing recorded creditors and of execution creditors so that they may not have a priority claim of undetermined amount hanging over them while their security depreciates. 'interrupted or suspended'—the period is 'interrupted' if, upon cessation of the circumstance which caused the interruption, the

[9] A proposal that this should be prevented was made by the Swedish delegation but rejected as too substantial an interference with national law (Minutes, twelfth meeting).

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	period commences to run again *ab initio*. It is 'suspended' in a case where the period before and after the suspension adds up to the total of three months.[10]
(5) This Article shall apply notwithstanding the provisions of Article 1, paragraph (2).	Paragraph (4) is in derogation of the first phrase and paragraph 1 of the second phrase of Article 1 (2).
ARTICLE 5	
The priority of a right mentioned in Article 1, paragraph (1) (d), extends to all sums thereby secured. However, the amount of interest included shall not exceed that accrued during the three years prior to the execution proceedings together with that accrued during the execution proceedings.	'to all sums thereby secured', *i.e.*, not only the principal but interest, costs, premiums and anything which is part of the mortgage debt.
ARTICLE 6	
In case of attachment or sale of an aircraft in execution, or of any right therein, the Contracting States shall not be obliged to recognise, as against the attaching or execution creditor or against the purchaser, any right mentioned in Article 1, paragraph (1), or the transfer of any such right, if constituted or effected with knowledge of the sale or execution proceedings by the person against whom the proceedings are directed.	This is to prevent the fraudulent transfer of an aircraft or creation of a charge by a debtor who has knowledge that the aircraft is the subject of execution. Note that *knowledge* is required, not *notice*. The Article applies where what is subject to execution is a right in an aircraft. Presumably this refers to a case where the debtor is merely a lessee or a purchaser under a conditional sale or equipment trust and not the owner.
ARTICLE 7	
(1) The proceedings of a sale of an aircraft in execu-	This in terms only refers to sale 'of an aircraft' and not of a

[10] Minutes, Legal Committee, Brussels, p. 59.

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tion shall be determined by the law of the Contracting State where the sale takes place.	'right in an aircraft'. It might appear therefore that where the debtor is not owner of the aircraft but only of a right (*e.g.*, under an equipment trust) paragraph (2) of this Article should not apply. It is suggested, however, that this is not the case and that paragraph (2) does apply *first*, because what is put up for sale is actually an aircraft and *secondly*, because (under Article 8) the aircraft passes free of all charges to a purchaser.
(2) The following provisions shall, however, be observed :	
(a) The date and place of the sale shall be fixed at least six weeks in advance.	
(b) The executing creditor shall supply to the Court or other competent authority a certified extract of the recordings concerning the aircraft. He shall give public notice of the sale at the place where the aircraft is registered as to nationality, in accordance with the law there applicable, at least one month before the day fixed, and shall concurrently notify by registered letter, if possible by air mail, the recorded owner and the holders of recorded rights in the aircraft and of rights noted on the record under Article 4, paragraph (3), according to their addresses as shown on the record.	The duty of obtaining a certified extract is cast on the creditor. He will obtain the address of the record from the certificate of registration (Article 3 (1)) and a certified extract under Article 3 (2). 'at the place where the aircraft is registered as to nationality' not where it is recorded. 'in accordance with the law there applicable', *i.e.* (presumably) in accordance with the local law as to judicial sales, for example, the French law of July 5, 1917, which requires advertisement in an official gazette, and an air transport publication, together with a notice on the door of the registry, etc. 'if possible by air mail'. The quickest method is intended to be used. If registered air mail cannot be sent, registered surface means should be used.

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	'according to their addresses as shown on the record'—if no address is shown the obligation lapses. The second sentence applies whatever are the provisions of the national law.
(3) The consequences of failure to observe the requirements of paragraph (2) shall be as provided by the law of the Contracting State where the sale takes place. However, any sale taking place in contravention of the requirements of that paragraph may be annulled upon demand made within six months from the date of the sale by any person suffering damage as the result of such contravention.	
(4) No sale in execution can be effected unless all rights having priority over the claim of the executing creditor in accordance with this Convention, which are established before the competent authority, are covered by the proceeds of sale or assumed by the purchaser.	This is a compromise paragraph. The issue was between those (including the U.S.) who considered that sale by an execution creditor should in all cases be subject to the charges, and the European States who held that charges are 'purged', *i.e.*, that title passes to the purchaser free from the charges which are paid off out of the proceeds. Two alternatives are given, that the charges are 'covered by the proceeds of sale' or 'assumed by the purchaser'. The second causes no difficulty; this is simply the case where the purchaser voluntarily takes subject to the charges. The first is obscure. It does not (and probably could not) deal with the vital question of exchange. If, for example, an aircraft, subject to a U.S. charge, is to be sold in France, must the

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(5) When injury or damage is caused to persons or property on the surface of the Contracting State, where the execution sale takes place, by any aircraft subject to any right referred to in Article 1 held as security for an indebtedness, unless adequate and effective insurance by a State or an insurance undertaking in any State has been provided by or on behalf of the operator to cover such injury or damage, the national law of such Contracting State may provide in case of the seizure of such aircraft or any other aircraft owned by the same person and encumbered with any similar right held by the same creditor :

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proceeds of sale be available in dollars equal to the charges, or is the condition satisfied if the equivalent (in French francs) is available? The French text ' éteints grâce au prix de la vente ' seems to contain the same ambiguity. ' éteints ' seems to require dollars, 'grâce au ' seems appropriate to a conception of equivalence. It can only be hoped that freedom of exchange will soon render this question academic.

' sale in execution ' refers only to a judicial sale and not to an extra judicial sale by a mortgagee under his power of sale.[11]

See above for the history of this paragraph. Points to be noted :

(i) The paragraph only provides protection for persons injured on the surface of the State where the proceedings take place—not of other States.

(ii) It applies whenever the aircraft causing the injury or damage is charged in any way—*e.g.*, where the property of the aircraft is held as security—as in an equipment trust, as well as in the case of an ordinary mortgage.[12]

(iii) ' adequate and effective insurance.' ' adequate ' refers to amount—see final clause. ' effective ' refers to the absence of escape clauses : the insurance money must in fact be payable in the events which happen.

(iv) ' by a State '—many States act as their own insurer for nationally owned aircraft : ' or any insur-

[11] Minutes, fifteenth meeting.
[12] See Minutes, Legal Committee, Brussels 1947, thirteenth meeting.

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	ance undertaking in any State'—this prevents a State from insisting upon insurance with an undertaking domiciled in that State. (v) 'the national law *may* provide.' The implementation of this paragraph is wholly optional. (vi) 'or any other aircraft owned by the same person and encumbered with any similar right held by the same creditor'. Aircraft of the same fleet may be seized and the paragraph applies if, but only if, the chargee of those aircraft is the same as the chargee of the aircraft which caused the injury or damage (obviously it would not be fair for another chargee to have his security diminished). 'owned' here must be used in a loose sense so as to include a purchaser under an equipment trust.
(a) that the provisions of paragraph (4) above shall have no effect with regard to the person suffering such injury or damage or his representative if he is an executing creditor;	The key to the understanding of (a) and (b) is to appreciate that (a) relates to the amount of the bid, (b) to the distribution of the proceeds of sale. (a) means that a bid may be received for the aircraft (and the sale thus proceed) notwithstanding that the amount of the bid is less than is required to cover the charges. (Under the continental system, a judicial sale commences by the tribunal fixing a minimum bid : it is only if an offer or offers equal to or greater than that amount is received that the sale proceeds—by auction.)
(b) that any right referred to in Article 1 held as security for an indebtedness encum-	This relates to the distribution of the proceeds of sale. The aircraft has been sold and the price

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bering the aircraft may not be set up against any person suffering such injury or damage or their representatives in excess of an amount equal to 80 per cent. of the sale price.	received by the Court. Not more than 80 per cent. of this amount can be paid to the chargees until the injured party has been satisfied.
In the absence of other limit established by the law of the Contracting State where the execution sale takes place the insurance shall be considered adequate within the meaning of the present paragraph if the amount of the insurance corresponds to the value when new of the aircraft seized in execution.	'corresponds to'—because there may have been changes of nationality since the aircraft was new: currency equivalent is here referred to.
(6) Costs legally chargeable under the law of the Contracting State where the sale takes place which are incurred in the common interest of creditors in the course of execution proceedings leading to sale, shall be paid out of the proceeds of sale before any claims, including those given preference by Article 4.	Compare Brussels Convention on Maritime Liens, 1926, Article 2 (1).
Article 8	
Sale of an aircraft in execution in conformity with the provisions of Article 7 shall effect the transfer of the property in such aircraft free from all rights which are not assumed by the purchaser.	The property only passes free from encumbrances if the provisions of Article 7 are observed. The property passes under this Article whatever the nature of the security and whether the execution debtor possesses title or whether (as in an equipment trust) title is vested in the security holder.[13]

[13] This result would probably not arise under U.S. law. However, the opinion that this is the effect of Article 8 is expressed by Calkins, *Journal of Air Law and Commerce*, Spring 1948, p. 175.

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ARTICLE 9

Except in the case of a sale in execution in conformity with the provisions of Article 7, no transfer of an aircraft from the nationality register or the record of a Contracting State to that of another Contracting State shall be made, unless all holders of recorded rights have been satisfied or consent to the transfer.

ARTICLE 10

(1) If a recorded right in an aircraft of the nature specified in Article 1, and held as security for the payment of an indebtedness, extends, in conformity with the law of the Contracting State where the aircraft is registered, to spare parts stored in a specified place or places, such right shall be recognised by all Contracting States, as long as the spare

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See above, p. 427, for general remarks on this Article. The Article imposes a double obligation : on the State of the transferor to prevent, and on the State of the transferee not to accept, registration or recording unless the condition is fulfilled. States will presumably establish administrative machinery to ensure that this Article is observed.

Note that the satisfaction or consent required is only of ' holders of recorded rights '. The case of persons having claims noted on the record is not dealt with. There is, of course, not the same reason to give them the protection of the Article *first*, since they were not (as recorded rights) constituted with reference to the law of the State of the transferor, *secondly*, since the note can be transferred to the new record without the possibility (which exists in the case of recorded rights) that the State of the transferee may refuse to admit them.

See above, p. 434, for general remarks on this Article. Points to note are :—

(i) The places where the spare parts are stored must actually be specified in the record.

(ii) If the spare parts are removed from the specified place, the protection of the Article lapses and the rights of the owner and the chargee are determined according to the local law.

(iii) ' Appropriate ' public

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parts remain in the place or places specified, provided that an appropriate public notice, specifying the description of the right, the name and address of the holder of this right and the record in which such right is recorded, is exhibited at such place where such spare parts are located, so as to give due notification to third parties that such spare parts are encumbered.	notice. This means that States may make regulations stating what is appropriate.
(2) A statement indicating the character and the approximate number of such spare parts shall be annexed to or included in the recorded document. Such parts may be replaced by similar parts without affecting the right of the creditor.	
(3) The provisions of Article 7, paragraphs (1) and (4), and of Article 8 shall apply to a sale of spare parts in execution. However, where the executing creditor is an unsecured creditor, paragraph (4) of Article 7 in its application to such a sale shall be construed so as to permit the sale to take place if a bid is received in an amount not less than two-thirds of the value of the spare parts as determined by experts appointed by the authority responsible for the sale. Further, in the distribution of the proceeds of sale, the competent authority may,	To understand paragraph (3) the distinction must be kept in mind between the minimum bid and the distribution of the proceeds of sale (see note on Article 7 (5) (a)). The minimum bid may be fixed at two-thirds of the value of the spare parts, *i.e.*, a sale can take place if a bid of this amount is received. In the distribution, the net proceeds of sale, after payment of costs, is divided into thirds and one such third may be reserved for the executing creditor provided that he is an unsecured creditor. The paragraph is designed for the protection of local unsecured creditors and may not be used to confer an advantage on other chargees who elect to use this forum.

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in order to provide for the claim of the executing creditor, limit the amount payable to holders of prior rights to two-thirds of such proceeds of sale after payment of costs referred to in Article 7, paragraph (6).

(4) For the purpose of this Article the term 'spare parts' means parts of aircraft, engines, propellers, radio apparatus, instruments, appliances, furnishings, parts of any of the foregoing, and generally any other articles of whatever description maintained for installation in aircraft in substitution for parts or articles removed.

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ARTICLE 11

(1) The provisions of this Convention shall in each Contracting State apply to all aircraft registered as to nationality in another Contracting State.

(2) Each Contracting State shall also apply to aircraft there registered as to nationality :

(a) The provisions of Article 2, Article 3 and Article 9, and

(b) The provisions of Article 4, unless the salvage or preservation operations have been terminated within its own territory.

The principle here attempted to be applied is that the Convention does not operate with regard to aircraft registered on a State's own registry unless there is, or is likely to be, involved some interest of a national of another Contracting State.

It is clear that other Contracting States have an interest in the observance of the provisions of Articles 2 and 3. Equally, Article 9 is for the protection of (amongst others) foreign owners of recorded charges and must be applied in all cases.

Article 4 is to be applied in all cases where the salvor (or person performing the operation of preservation) relies upon the law of another Contracting State : this is

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a necessary encouragement to nationals of all Contracting States to undertake the operations of salvage or preservation.

If the operations terminate in the State of the aircraft's nationality, it is considered that the persons concerned should look to the law of that State for their remuneration or indemnity.

See also note on Article 1 (2).

Article 12

Nothing in this Convention shall prejudice the right of any Contracting State to enforce against an aircraft its national laws relating to immigration, customs or air navigation.

Article 13

This Convention shall not apply to aircraft used in military, customs or police services.

Article 14

For the purpose of this Convention, the competent judicial and administrative authorities of the Contracting States may, subject to any contrary provision in their national law, correspond directly with each other.

Article 15

The Contracting States shall take such measures as are necessary for the fulfilment of the provisions of this Convention and shall forthwith inform the Secretary-General of the International Civil Aviation Organisation of these measures.

Article 16

For the purposes of this Convention the term 'aircraft' shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.

Article 17

If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible, references in this Convention to the

law of the Contracting State shall be construed as references to the law of that territory.

ARTICLE 18

This Convention shall remain open for signature until it comes into force in accordance with the provisions of Article 20.

ARTICLE 19

(1) This Convention shall be subject to ratification by the signatory States.

(2) The instruments of ratification shall be deposited in the archives of the International Civil Aviation Organisation, which shall give notice of the date of deposit to each of the signatory and adhering States.

ARTICLE 20

(1) As soon as two of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the second instrument of ratification. It shall come into force, for each State which deposits its instrument of ratification after that date, on the ninetieth day after the deposit of its instrument of ratification.

(2) The International Civil Aviation Organisation shall give notice to each signatory State of the date on which this Convention comes into force.

(3) As soon as this Convention comes into force, it shall be registered with the United Nations by the Secretary-General of the International Civil Aviation Organisation.

ARTICLE 21

(1) This Convention shall, after it has come into force, be open for adherence by non-signatory States.

(2) Adherence shall be effected by the deposit of an instrument of adherence in the archives of the International Civil Aviation Organisation, which shall give notice of the date of the deposit to each signatory and adhering State.

(3) Adherence shall take effect as from the ninetieth day after the date of the deposit of the instrument of adherence in the archives of the International Civil Aviation Organisation.

ARTICLE 22

(1) Any Contracting State may denounce this Convention by notification of denunciation to the International Civil Aviation

Organisation, which shall give notice of the date of receipt of such notification to each signatory and adhering State.

(2) Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organisation of the notification of denunciation.

Article 23

(1) Any State may at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Convention does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

(2) The International Civil Aviation Organisation shall give notice of any such declaration to each signatory and adhering State.

(3) With the exception of territories in respect of which a declaration has been made in accordance with paragraph (1) of this Article, this Convention shall apply to all territories for the foreign relations of which a Contracting State is responsible.

(4) Any State may adhere to this Convention separately on behalf of all or any of the territories regarding which it has made a declaration in accordance with paragraph (1) of this Article and the provisions of paragraphs (2) and (3) of Article 21 shall apply to such adherence.

(5) Any Contracting State may denounce this Convention, in accordance with the provisions of Article 22 separately for all or any of the territories for the foreign relations of which such State is responsible.

In witness whereof the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

Done at Geneva, on the nineteenth day of the month of June of the year one thousand nine hundred and forty-eight in the English, French and Spanish languages, each text being of equal authenticity.

This Convention shall be deposited in the archives of the International Civil Aviation Organisation where, in accordance with Article 18, it shall remain open for signature.

EDITORIAL NOTES

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

THE Forty-Second Annual Meeting of the American Society of International Law was held at the Carlton Hotel, Washington, D.C., on April 22–28, 1948. The over-all theme was the impact of the United Nations on the development of international law.

Professor Charles Cheney Hyde, the President of the Society, Professor Emeritus of International Law at Columbia University, quondam solicitor for the State Department, addressed the meeting briefly but incisively on current trends, including the suggestion that General Eisenhower might be an 'irresistible convincer' in a conference with Prime Minister Stalin to compose differences between the two countries. He pointed out 'The whole resourcefulness of our country is challenged to convince Russian authority that it may, without war and without fear of war, and hand-in-hand with the United States, pursue a course that will insure the mightiest benefits to both nations and give to both a common and fresh zeal to make peace with their existing enemies'.

Professor Hyde recalled that, when the United States and Russia resumed diplomatic relations in 1933, President Roosevelt exacted from Maxim Litvinoff, then Commissar of Foreign Affairs, a Russian declaration of fixed policy. This pledge, Doctor Hyde said, was merely the obligation which Russia owed the United States and other independent countries under international law, 'The Soviet regime must have realised this and that regime should realise it today' he added.

The message and greeting from the President of the United States was read for him by Secretary George Finch. President Truman keynoted the theme thus :

'The host of difficult problems which emerged from World War II and other serious problems of international scope, which together have brought about the present critical condition of the general world situation, cannot be finally solved, except on a firm foundation of law and justice.' The United States, he said, is dedicated to the solution of these problems upon such a foundation. 'The strengthening of the United Nations continues to be a cornerstone of the foreign policy of the United States,' he declared.

The formal address of the opening session was a report on the 'Development of International Law' by Professor Manley O. Hudson of the Harvard Law School and formerly United States

Judge on the World Court. He urged a close co-ordination between the work of the League agencies and the United Nations. He spoke candidly and frankly of the relation of the United States to the United Nations as thus far developed.

The morning session on Friday, April 23, was devoted to a discussion on the 'Development of International Law' which was opened by Professor Philip C. Jessup. He has been acting as assistant to United States Delegate Warren R. Austin and participating in issues pending before the Security Council. He developed, as fully as the short time assignment permitted, the theme of Unity of Law as reflected in current issues recently before agencies of the United Nations. This subject he had an opportunity to explore more fully on June 11 at a dinner meeting of the United Nations League of Lawyers, of which the writer is Secretary-General. Kenneth S. Carlston, Professor of Law at the University of Illinois, participated in the discussion. He made some point of the part played by Arbitral Law and Procedure in the evolution of international law. Since the annual meeting, Professor Carlston has published an authoritative work on arbitration.

The Friday evening session was given over to 'International Law and the European Recovery Program'. It was well balanced and most interesting through the effective presentations of Ernest A. Gross, Legal Adviser of the Department of State, and Congressman Christian A. Herter, member of Congress from Massachusetts. He had acted as Chairman of the Joint Congressional Committee survey in Europe last summer. His able handling of this difficult assignment contributed greatly to the bipartisan support of the Marshall Plan on its way through Congress. In this respect he pointed out that the power of appropriation is giving the House of Representatives the controlling voice in American foreign policy. He said further that the House's 'obvious power' in foreign affairs was 'one for which it was particularly unsuited and not intended to have'. He added that this trend tendered a problem that had to be solved. However, the young and able Legal Adviser kept the discussion lined up as closely as possible with international law questions, particularly the impact of the unprecedented European Relief Program on established international law concepts.

The Saturday session was devoted to business matters, meeting of the Executive Council and the election of officers. Most officers were re-elected, including the writer as Treasurer.

At the annual dinner held on the evening of the same day at the Carlton Hotel, Washington, Ambassador Warren R. Austin delivered a notable address. He said that it was a special privilege

to address the American Society of International Law on the 300th anniversary of the Peace of Westphalia which is so often taken as a convenient date to mark the beginning of our modern State system under the rule of international law. The arrangements for that great conference present interesting contrasts and comparisons to the new type of conferences which are being continually held within the system of the United Nations. While it is true that under our present arrangements, we shuttle back and forth between Manhattan, Flushing Meadows and Lake Success, we do not confront the difficulties which the conferees faced three hundred years ago, as they met in Münster and Osnabrück, which were thirty miles apart. Although it sometimes seems to involve delay to organise sessions of the various organs of the United Nations, we recall that the meetings of the Congress at Münster and Osnabrück were scheduled to begin in July, 1643, that all during 1644 the Ambassadors continued to arrive, and that the Congress did not actually get to work till the Spring or early Summer of 1645. Once they had actually begun to debate the issues before them, three years were consumed before the Treaty was signed in October, 1648. By comparison, the meetings of the United Nations proceed with the speed of a jet-propelled plane.

Article 1 of the Charter states that it is one of the purposes of the United Nations to adjust or settle international disputes or situations which might lead to a breach of the peace 'in conformity with the principles of justice and international law'. The principles of justice are immutable but international law, like all law, is constantly developing, 'line upon line, precedent upon precedent'. Ambassador Austin continued :

"Although I realise that this audience includes numerous scholars, officials of government and private practitioners who follow closely the work of the United Nations, I should like to speak tonight about some of the legal precedents which are constantly being built up in the organs of the United Nations and with many of which as an official practitioner of international law, I am called upon to deal.

The first topic which I wish to mention is listed in Professor Hyde's standard book under the heading *The Birth of a State in International Law*. The society of nations is not a closed circle. We have moved forward from the days when only the Western or Christian States were considered to have the rights and duties which the law of nations embodies. International law is now a universal system. New States appear and take their places in the juridical group known as the society or family of nations. Fifty-eight of them are also members of the United Nations.

Membership in the United Nations is evidence of Statehood, but obviously not the sole evidence. A number of old-established States and some newer ones are not members. Some have been excluded from membership for political reasons in violation of the Charter.

My comments have already carried me into Professor Hyde's next section, which is entitled 'Recognition'. In addition to the problem of recognition of new States, there is the question of recognition of governments. When governments change in a State and the question of recognition arises, there may be an issue concerning the status of representatives of the State in organs of the United Nations when such representatives have been accredited by a government which is not recognised by all other Members. Up to the present the organs of the United Nations have not dealt specifically with this problem of recognition and it may be that it will not be considered necessary to do so. But I suggest that the student of recognition will continue to find interesting materials for analysis in United Nations practice.

Next on the list comes the question of 'Intervention'. This topic in turn raises the issue of those matters which are considered to be domestic. I hardly need to remind you that paragraph 7 of Article 2 of the Charter provides: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . .'. In the interpretation and application of this provision of the Charter, it is necessary to consider the meaning both of 'intervention' and of 'domestic jurisdiction'. These problems have already arisen in the organs of the United Nations in connection with the disagreement between India and the Union of South Africa before the General Assembly, and in the Indonesian and Czechoslovak cases before the Security Council. The problem has also been discussed in connection with the study of human rights and of genocide.

The next point to which I wish to refer comes under the heading of 'Succession' and 'Certain Effects of Change of Sovereignty'. When the Indian Independence Act took effect in August, 1947, India and Pakistan were set up as separate international entities. From the point of view of the international lawyer, this presented a situation in which a part of an existing State is separated from the old State and becomes a new one. This change, of course, did not affect the position of India or its status as a Member of the United Nations. It did immediately bring up the question of the admission of Pakistan as a Member of the United Nations and action was promptly taken to accord membership to this new State.

Under the general heading 'Rights of Jurisdiction', I should like to call your attention to the interesting discussions which have taken place during these past few weeks in the *ad hoc* committee on genocide. Among the issues which have been discussed in this committee are those of national jurisdiction to punish the perpetrators of this crime under a general international convention which it is proposed to conclude; the question of territorial limitations upon jurisdiction and so-called 'universal jurisdiction'; and finally, the problem of international jurisdiction before some possible international tribunal which might be authorised to deal with genocide which the General Assembly on December 11, 1946, affirmed to be a crime under international law.

I come next to 'Diplomatic Intercourse of States' and the question of the privileges and immunities of representatives of States in United Nations organs and of members of international secretariats. This subject has been admirably treated in several contributions to the journal of this Society and I need not go over old ground.

At the last session of the General Assembly on November 21, 1947, another Convention on the Privileges and Immunities of the Specialised Agencies was also approved by the General Assembly. This latter Convention of forty-nine sections and nine annexes is a carefully drawn legal instrument of some intricacy. Section 32 provides for submission to the International Court of Justice of differences arising out of the interpretation or application of the Convention. It includes the interesting provision that if a difference arises between a specialised agency and a member, the Court shall be asked for an advisory opinion and the 'opinion given by the Court shall be accepted as decisive by the parties'. In addition, section twenty-four of the Convention provides a special rule for cases where a State believes that a privilege or immunity has been abused. If the Court in its advisory opinion finds that such an abuse has occurred, the State concerned may withhold from the specialised agency in question the rights or the privilege or immunity so abused."

Ambassador Warren R. Austin concluded his address by observing that 'in presenting to this distinguished body of international lawyers tonight this fragmentary collection of legal samples from the daily experience of the United Nations, my intention is merely to emphasise the role which law is playing in the evolution of that great organisation. Many of you here are teachers of international law and must have been gratified to read the resolution adopted by the General Assembly on November 21, 1947, requesting the governments of Member States "to take appropriate measures to

extend the teaching of international law in all its phases ". In this country the Federal Government does not control education and we cannot take the same direct action which can be taken by States having national universities. In the United States, however, the teaching, the practising, the developing of international law can proceed through the mutual co-operation of organisations like this American Society of International Law on the one hand, and on the other hand those of us who are in the service of our Government in connection with the activities of the United States. I can offer you our co-operation and I can assure you that we shall welcome yours '.

Contributed by Mr. Howard S. Le Roy,
Correspondent of the *International Law Quarterly*
in the United States of America.

The Jurisdiction of the International Court of Justice [1]

The Statute of the International Court of Justice is based on the Statute of the Permanent Court of International Justice. Its jurisdiction will comprise approximately the same cases as did its predecessor. The Court only deals with questions between States.[2] It should also be made quite clear that the Court only deals with civil cases and has no jurisdiction of a penal character.

There are today thirty States which are bound by the so-called Optional Clause, having accepted the obligatory jurisdiction of the Court according to Article 36 of the Statute. It should be noted that many such declarations have been signed, subject to very serious reservations, the most dangerous of which is perhaps that excepting from the jurisdiction of the Court any matters which fall within the domestic jurisdiction of the country in question, as decided by that country itself.[3] Furthermore, States can accept the obligatory jurisdiction specifically in bilateral or multilateral treaties.[4] They can also accept the same obligation in jurisdictional

[1] Summary of the paper read by Dr. Edward Hambro, Registrar of the International Court of Justice, at the meeting of the Grotius Society which was held at the Old Hall, Lincoln's Inn, on June 2, 1948, under the Chairmanship of Sir Arnold D. McNair, President of the Society. The full text will be published in Vol. 34 of the *Transactions of the Grotius Society*, This paper represents the author's personal views only and does not in any way engage the responsibility of the Court.

[2] Individuals do, however, from time to time ask for the intervention and protection of the Court (see *Yearbook* 1946–1947, p. 116).

[3] The American reservation says: ' Provided that this declaration shall not apply to . . . (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America . . . ' (*Yearbook* 1946–1947, p. 218).

[4] See, for instance, Article 7 of Treaty between Spain and Portugal, of January 18, 1928. (P.C.I.J. Series D, No. 6, p. 261, and L.o.N. Treaty Series, Vol. LXXVII, p. 119.)

clauses in other treaties. Article 37 of the Statute states that 'Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice'.

Article 36, paragraph 3 of the Charter of the United Nations has introduced a novelty in the matter of jurisdiction :

> 'In making recommendations under this Article, the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court.'

The wording seems to indicate fairly clearly that it is only a question of a recommendation, and it is generally, although not unanimously agreed, that recommendations are not binding.[5] It is furthermore to be noted that the Council does not itself refer the matter to the Court, but recommends the parties to do so, in accordance with the Statute of the Court.

The new Court, like the old one, is based on the principle that acceptance of the jurisdiction of the Court is completely optional, but, on the other hand, that such consent need not take any particular form. It should be particularly noted that the Court adopted the so-called rule of *forum prorogatum* in the following sentence in the *Corfu Channel Case* :—

> 'Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12, of April 26, 1928, page 23 : "The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement".'

As regards advisory opinions, Article 96 of the Charter provides that

> '(1) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> (2) Other organs of the United Nations and Specialised Agencies, which may at any time be so authorised by the

[5] See Goodrich and Hambro, *Charter of the United Nations*, p. 125. And judgments of Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha and Krylov in the *Corfu Channel Case*, *supra*, pp. 78–9.

> General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.'

The authorisation mentioned in the second paragraph of this Article has now been given to all the main organs of the United Nations and to most of the Specialised Agencies.[6]

With only one exception, all the Trusteeship Agreements contain a jurisdictional clause conferring jurisdiction on the Court.[7]

The fact that only States can appear as parties before the Court, and only international organisations can ask for advisory opinions, has given rise to discussion. Such provisions might indeed create difficulties in the case of conflicts between an international organisation and a Member State or a non-Member State. This was brought out particularly strongly in the debates concerning the relations between the International Trade Organisation and the International Court of Justice, and the matter is still being studied by that Organisation.[8]

This problem has also been discussed in a learned and provocative paper by Mr. C. W. Jenks.[9]

The scope and character of advisory opinions were discussed during several heated debates in the General Assembly during the second session in 1947. It eventually adopted a resolution asking the Court to give an advisory opinion on the following question :

> 'Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognises the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?'[10]

During the debates in this case, it was claimed by certain Governments that the Court was not entitled to interpret the Charter. It was also claimed that the question was not legal, but

[6] See *Yearbook of the Court* 1946–1947, p. 113 and corresponding page in *Yearbook* 1947–1948 which was in the press when this article was written.
[7] See *Yearbook* 1946–1947, p. 108.
[8] See particularly the Resolution concerning the relations between the International Trade Organisation and the International Court of Justice on p. 73 of United Nations Publications Sales No. 1948. II.D.4. E/Conf.2/78.
[9] *Transactions of the Grotius Society*, 32nd Vol. (1947), pp. 1 ff.
[10] See United Nations Document A. 519, p. 19.

political, and lastly, that the Court should not give an answer to an abstract question. However, all the Members of the Court agreed that the question was legal and fell within the jurisdiction of the Court.[11]

Concerning the argument that the Court should not interpret the Charter, the Opinion of the Court states :

> ' Lastly, it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, " the principal judicial organ of the United Nations ", to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.'

The Court likewise dealt with the argument concerning the abstract character of the question in the following statement :

> ' It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.'

From the first two cases submitted to the Court so far, it is indicated clearly that the Court continues in the liberal and progressive spirit previously displayed by the Permanent Court of International Justice.

THE UNITED NATIONS LEAGUE OF LAWYERS

THE United Nations League of Lawyers was founded at Washington on March 30, 1946. Its objects and purposes are, as stated in Article 1, section 2 of the Constitution, ' to establish and maintain co-operative relations among the lawyers of the United Nations; to advance the science of law in all its phases; to foster the study of international and comparative law; to encourage the development of law as the basis of international relations; to encourage the use of arbitration and judicial settlements in international disputes; to study and support the Charter of the United Nations and, by these means, to further the cause of friendship, peace and goodwill among nations '. Any lawyer or jurist is eligible to apply for membership, the fee for which is $5.00 per annum.

At a meeting of the Executive Council held in New York on June 11, 1948, with His Excellency Alexandre Parodi, Ambassador

[11] Text of the Court's Opinion will be found at pp. 483, *post*.

of France to the United Nations, Vice-President of the League of Lawyers, in the chair (in the unavoidable absence of Sir Hartley Shawcross, President of the League), a proposal was carried recommending that the annual Conference of the League be held in Paris during the fourth quarter of 1948. The Secretary-General (Mr. Howard S. Le Roy, who is treasurer of the American Society of International Law and correspondent in the United States of this *Quarterly*) expressed the hope that holding the Conference in Paris would broaden the membership of the League and further the general object of establishing national sub-divisions of the League in European countries.

INTERNATIONAL LAW FORUM AT THE UNIVERSITY OF MICHIGAN

Current Problems in International Law were under discussion at a Forum arranged by the Law School of the University of Michigan during two successive week-ends in July last, as part of the Summer Session of the University. This is further evidence of the growing interest in international law evinced throughout the world at the present time. The programme, which follows, shows the wide scope and appeal of the Forum :—

Part. I. International Law and Private Rights.—*Conflict Between International and Domestic Law* : Lawrence Preuss, Professor of Political Science, University of Michigan. *The Legal Status of the United Nations in the United States* : Dr. Yuen-Li Liang, Director, Division of Development and Codification of International Law, United Nations. *The British Approach to International Law* : James L. Brierly, Professor Emeritus of International Law, Oxford University, England. *International Law and Air Transportation* : Charles S. Rhyne, Member of the Bar of the District of Columbia and Vice-Chairman of the Section on International and Comparative Law of the American Bar Association. *The Legal Status in the United States of Foreign Government Owned Corporations* : William W. Bishop, Jr., Professor of International Law, University of Michigan.

Part II. International Law and Public Rights.—*Legal Problems of German Occupation* : Charles Fahy, Member of the Bar of the District of Columbia, formerly Legal Adviser, Department of State. *The Present International Status of Germany* : Max Rheinstein, Professor of Comparative Law, University of Chicago. *International Crimes and their Prosecution* : George Burke, Member of the Michigan Bar, and Judge, Military Tribunal No. 5, International Military Trials, Germany. *Codification of*

International Law : James L. Brierly, Professor Emeritus of International Law, Oxford University, England. *International Law and Human Rights* : Hersch Lauterpacht, Whewell Professor of International Law, Cambridge University, England. *Peace Treaties of World War II* : William W. Bishop, Jr., Professor of International Law, University of Michigan.

THE 1948 DANUBE CONVENTION

ON July 31, 1948, a Conference, convened in accordance with a resolution of the Council of Foreign Ministers in December 1946, met in Belgrade to consider a new Convention for the Danube. The Conference was attended by representatives of all the riparian States with the exception of Germany,[1] and by delegations from France, the United Kingdom, the U.S.A. and the U.S.S.R. The delegation representing the U.S.S.R. laid before the Conference a draft Convention, the final text of which will be printed in the next issue. The Convention was accepted by the delegations representing the U.S.S.R., Bulgaria, Czechoslovakia, Hungary, Roumania, the Ukraine and Yugoslavia. According to Article 47 of the Convention it will enter into force after the deposit of six instruments of ratification.

The new Convention for the Danube was not accepted by the delegations representing the United Kingdom, France and the United States. In stating that His Majesty's Government would not recognise the new Convention, the representative of the United Kingdom said :

' His Majesty's Government must, therefore, state categorically that they cannot recognise any new Danube Convention which claims to place certain users of the Danube in a monopolistic position, nor any Convention which denies to non-riparian Powers with major commercial interests in that waterway any voice in the Commission which is to be responsible for its administration '.

The differences between the new Convention and the Convention instituting the Definitive Statute of the Danube of July 23, 1921, which His Majesty's Government regards as still being in force, are numerous, and it is proposed for the purposes of the present note only to indicate the principal respects in which the two Conventions differ, and the extent to which the new Convention derogates from the international character of the Danube régime.

In the first place, the extent of the internationalised river system, as defined in Article 2 of the new Convention, is more

[1] Austria attended only as an observer.

restricted than that recognised by Articles 1 and 2 of the 1921 Statute. The régime established by the new Convention ' is applicable to the whole navigable part of the Danube river between Ulm and the Black Sea over the Sulina arm with the outlet to the sea through the Sulina Canal '. In Article 2 of the 1921 Statute the internationalised river system was stated to consist of certain tributaries of the Danube and ' any lateral canals or waterways which may be constructed, whether to duplicate or improve naturally navigable portions of the river system, or to connect two naturally navigable portions of one of these waterways '.

The provisions intended to ensure unrestricted navigation on the Danube and equality of treatment for all flags, are also more restricted in the new Convention than in the 1921 Statute. Article 1 of the new Convention has the same wording as Article 36 of the Treaty of Peace with Roumania (and the corresponding Articles relating to the Danube in the Treaties of Peace with Bulgaria and Hungary), and whilst providing that ' Navigation on the Danube shall be free and open for the nationals, vessels and commerce, and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping ' omits from the Convention the provision in Article 1 of the 1921 Statute stipulating (subject to the cabotage reservation contained in Article 22 of the Statute) that no distinction shall be made, to the detriment of the subjects, goods and flag of any Power between them and the subjects, goods and flag of the riparian State itself or of the State of which the subjects, goods and flag enjoy the most favoured nation treatment.

The new Convention abolishes the two separate Commissions established under Article 3 of the 1921 Convention to assure ' freedom of navigation and the equal treatment of all flags ', *i.e.* the European Commission for the Maritime Danube and the International Commission for the fluvial Danube and the waterways referred to in Article 2 of the 1921 Statute. Under Article 5 of the new Convention, these two Commissions are to be replaced by a single Commission, to be composed of one representative of each Danube State. An amendment to this Article of the draft Convention intended to provide for representation on the Commission of non-riparian States, was rejected, and there is, therefore, no doubt that the expression ' Danube State ' in this Article of the new Convention refers to riparian States only. The non-riparian Powers represented on the European Commission and the International Commission under the provisions of the 1921 Statute (*i.e.*, France, Great Britain and Italy) are, under the new Convention, deprived of any representation on the Danube Commission, and

there is no provision in the new Convention similar to that in Article 4 of the 1921 Statute which provided for the future admission to the European Commission and, therefore, by virtue of Article 8, to the International Commission of 'any European State which, in future, is able to prove its possession of sufficient maritime, commercial and European interests at the mouths of the Danube'.

Since the new Convention abolishes non-riparian representation on the Commission responsible for ensuring freedom of navigation on the Danube, it becomes of great importance to decide how far the new Danube Commission has power effectively to control the carrying out of the provisions of the Convention by the riparian States. Article 8 of the new Convention sets out the terms of reference of the Danube Commission established under Article 5, and it is specifically stated that one of the Commission's functions is 'to supervise the carrying out of the provisions of this Convention'. A most significant omission from the Convention, however, is any Article corresponding to Article 10 of the 1921 Statute which provided that the International Commission was responsible for ensuring :—

(i) that no obstacle of any description due to the action of one or more States was placed on the unrestricted navigation of the river;

(ii) that in respect of access to and the use of ports and their equipment, the nationals, goods and flags of all Powers were treated on a footing of complete equality; and

(iii) that the international character assigned by previous Treaties to the river system of the Danube suffered no prejudice.

It is true that Article 41 of the new Convention provides that 'vessels entering ports for loading and discharge shall be entitled to use loading and unloading machinery, load plant, stores, store space, etc.' and that 'there shall be no discrimination determining the amount of costs for services rendered'. The value of this Article is, however, open to doubt in the light of the provision contained in it that the use of port facilities shall be 'on the basis of agreements concluded with the appropriate transportation and expeditionary agencies'.

In spite of certain significant omissions which tend to limit the powers of the Danube Commission, the new Convention would be far less objectionable if it did not contain two Articles (Articles 20 and 21) which provide, respectively, for the setting up of a Special River Administration in the lower part of the Danube between the

mouths of the Sulina Canal and Braila, and a Special Administration for the 'Iron Gates' over which the Danube Commission will have little, if any, control. These Administrations are to 'act on the basis of agreements concluded between the Governments of the countries parties to the Administration'. The Commission is to be informed of the provisions of these Agreements (Article 22), but if, in fact, they result in restricting freedom of navigation on the sections of the river affected, it appears that the Commission will have no power to take any effective action. Further, Annex II to the Convention contemplates the setting up at some future date of another Special River Administration for the Gabcikovo-Gonyo Section of the river. The provisions in respect of these Special Administrations in the new Convention can usefully be compared with the much more effective control given to the International Commission (by Article 33 of the 1921 Statute) in the case of the Special Administration set up by Article 32 for the Iron Gates.

Finally, and to emphasise the realisation afforded by a study of the new Convention that the international character of the river is prejudiced by its provisions, there is a very significant omission from Article 45 of the new Convention which deals with the settlement of disputes concerning the application and interpretation of the Convention between States which are parties to the Convention. Article 38 of the 1921 Statute provided for the reference of such disputes, under certain conditions, 'to the special jurisdiction set up for that purpose by the League of Nations'. Article 45 of the new Convention provides for the reference of disputes to a Conciliation Commission 'composed of one representative of each party and one representative appointed by the Chairman of the Danube Commission from among the nationals of States not parties to the dispute', and further that any decision of the Conciliation Commission shall be accepted by the parties to the dispute as definitive and binding. There is no machinery provided in this Article or any other Article of the new Convention for the settlement of disputes in accordance with the procedure set out in the United Nations Charter and the Statute of the International Court of Justice, and an amendment proposing the inclusion of such provisions in the new Convention was rejected.

* * *

[An announcement dated October 18, 1948, was issued by the *Caisse Commune des Porteurs des Dettes Publiques Autrichienne et Hongroise Émises Avant la Guerre* concerning the Hungarian 3 per cent. (Gold) Loan, 1895 (Iron Gates Section) in which the Board

pointed out that ' the *Caisse Commune* had been charged with the servicing of this loan under specific agreements entered into between the Roumanian Government, the Yugoslav Government and the International Danube Commission created by the Convention of 1921. This Commission had undertaken to remit to the *Caisse Commune* the net profits resulting from the navigation charges levied in the Iron Gates sector of the Danube, which represented the security for the loan.

The new Danube convention of August, 1948, which was not signed by Great Britain, France or the United States, purported to set up a new Danube Commission free of all debts and obligations of the earlier two commissions, the International Commission just mentioned and the European Commission of the Danube. The *Caisse Commune* was not a party to the 1948 convention '.

The Board further pointed out that, moreover, bondholders' rights were secured to them under the contract under which the Hungarian 3 per cent. loan was floated and that these rights were confirmed by the Peace Treaties following on the two world wars. Finally, the announcement concluded, Roumania and Yugoslavia, the riparian States in the Iron Gates section were debarred from any claim that these rights were annulled by the 1948 convention, by the circumstance that they were themselves guarantors of the servicing of the loan.]

A NEW CODE OF PRIVATE INTERNATIONAL LAW (CZECHOSLOVAKIA)

THERE are comparatively very few States which codified the rules of their municipal law governing the many possible legal relationships between their own nationals and foreigners. The subject-matter of private international law seems an especially difficult object of codification and international lawyers will study with the greatest interest the most recent code of private international law. It is the Czechoslovak Act dated March 11, 1948, on private international and interlocal law and the legal status of aliens within the sphere of Czechoslovak private law. This Act was published in No. 19 of the Czechoslovak Collection of Laws of April 10, 1948, and became effective as from June 1, 1948.

The Czechoslovak codification follows earlier continental examples which, however, were mostly restricted to the clarification of the principles governing rules of private international law and rarely went into such details as the new Czechoslovak law which contains seventy-five sections. It may be appropriate to recall here that the other continental countries which have codified rules of private international law are Switzerland (since 1891), Germany (1900), Austria (1941, resp. 1945), Poland (1926), Lichtenstein (1926), Italy (1939), and Greece (1940).

Although the economic and personal contacts between Great Britain and Czechoslovakia have been much restricted by recent events, the legal consequences of earlier relations are still having their effect and the new Czechoslovak law touches upon nearly every legal question which can arise between Great Britain and Czechoslovakia within the sphere of private international law. As the Act came into force so recently, it will very likely affect many questions which are still sub judice before the English Courts. To mention only one case, I would quote *Frankmann* v. *Prague Credit Bank* [1] (Law Reports 1948, Part VI—June, K.B., p. 730) which will be an important precedent for many similar cases involving assets of Czechoslovak citizens or former citizens in this country.

But the new Czechoslovak code of private international law will be also of practical interest on English-Czechoslovak questions of divorce, guardianship, legitimacy of children, claims arising out of contracts, questions of citizenship, winding-up of estates, etc., as the following short summary of the code will indicate.

The first chapter deals with the capacity to make any legal acts, the form of legal transactions and the choice of law by the parties. As to the first, it lays down that the nationality of the person involved is decisive regarding his capacity to make legal acts. As to the form of legal transactions, the Code provides in section 7 that the form is governed by the law ' by which the legal transaction itself is governed '. It is generally sufficient, however, to observe the rules of the place where the declarations of the parties were made (section 8). Parties to a contract are permitted to submit ' the legal relationship ' to a particular law provided that such relationship has a significant connection with the law so chosen (section 9). Sections 10–35 deal with family law, *i.e.*, the conclusion of marriage, matrimonial relationships, dissolution of marriage, legitimacy of children, illegitimate children, adoption of children and guardianship. Sections 36–39 deal with real rights and provide that real rights to tangible movables and immovables are governed by the law of the place where they are situate. Very important for cases like the case already referred to of *Frankmann* v. *Prague Credit Bank* and generally, for actions by all Czechoslovak owners of property situate in England against the possessors of such property, is section 39 of the Code which seems to make it certain that from now on (*recte* from June 1, 1948) *English* and not Czechoslovak law applies in all such cases. It reads as follows : ' Whether an owner's action against the possessor can be entertained and in how far it may be entertained shall be decided according to the law of

[1] Reported in Vol. II, *International Law Quarterly*, p. 96.

the place where the thing concerned was situate on the day when the possession arose '.

Sections 40–43 deal with problems of succession and emphasise generally the principle of the nationality of the deceased (not of his domicile). Section 43 provides that the form of making dispositions *mortis causa* is governed by the law of the State of which the deceased is a national at the date of making such dispositions. It is sufficient, however, if the law of the place where the declaration is made is duly observed.

Sections 44–47 deal with obligations and contracts. Contracts of sale are governed by the law of the seller, contracts of insurance by the law of the insurer, contracts with professional men involving their professional work by the law of their residence, contracts concerning labour or apprenticeship by the law of the master. Damages arising from torts are to be claimed by the law of the place where the tort was committed.

Sections 50–52 deal with citizenship. A Czechoslovak citizen who acquires another nationality will still be regarded as a Czechoslovak citizen. It is, therefore, important that Czechoslovak citizens naturalised in this country, should receive a declaration of ' release from citizenship ' from the Czechoslovak authorities.

Section 54 is not interesting for an English reader as it deals with ' interlocal private law ', *i.e.*, the problems arising out of the fact that the law of Bohemia and Moravia is somewhat different from that valid in Slovakia. It may perhaps resemble, to some extent, the questions arising out of differences between English and Scottish law.

According to section 55, aliens shall enjoy the same rights as Czechoslovak citizens provided reciprocity to Czechoslovak nationals is observed.

Sections 61–69 deal with the winding up of estates. The estate of a Czechoslovak citizen shall be wound up according to Czechoslovak law; if, however, the estate is situate abroad, only ' in so far as such estate shall be delivered to the Czechoslovak Courts ' (section 61). Estates of foreigners in Czechoslovakia shall be dealt with according to Czechoslovak law ' provided no objections are raised by any heir . . . having a title by the law of the State of which the deceased was a national ' (section 63).

The Ministry of Justice is competent to issue, in agreement with the Ministry of Foreign Affairs, a declaration whether a foreign State is observing the rules of reciprocity and such declaration is binding upon the courts and administrative authorities (section 70). Sections 71–75 finally contain various transitory and concluding provisions.

Contributed by ALFRED DRUCKER.

Some Legal Aspects of Immunity of State Property [1]

There seems to be considerable agreement that real property rights as a rule are so intimately connected with the independence of the local State, that the courts of the local State (of the *lex situs*) must be deemed to have jurisdiction. If this were not so, it might lead to a denial of justice, considering there may be no jurisdiction whatsoever as to immovable property except in the territory where the property is situate.

But this does not decide the question which is to be settled independently, whether the principle of the jurisdiction of the courts of the *lex situs*, *i.e.*, the local State, applies also

(a) to measures of execution from a judgment;

(b) to legislation in nature of expropriation;

(c) to depossession of an owner in pursuance of a legislation of expropriation.

The principle that the courts of the local State must have jurisdiction, since there would not be jurisdiction anywhere else, does not actually apply to measures of enforcement, and this for the following two reasons:

(1) it cannot be assumed that a foreign State would refuse to carry out a judgment rendered against it;

(2) a compulsory measure would be in violation of the dignity of a foreign State.

It is obviously for this reason that the Harvard Draft Resolution, dealing with the competence of the courts of a local State in regard to foreign States, laid down in 1932 (*American Journal of International Law, Supplement* 1932, p. 578, Article 9) that the effect of the principle of the *lex situs* is to permit an adjudication of rights leaving the question of enforcement to other methods.

Since there are no decisions dealing with the enforcement of claims against the local State in relation to immovables only of the foreign State directly in point, one has to refer to cases which do not necessarily relate or relate only to landed property, but in which the courts considered generally whether the submission to local jurisdiction included submission to execution. This inference appears the more justified in view of the fact that local jurisdiction with regard to real property belonging to a foreign State has as a rule been treated as a tacit submission or as a situation of the like nature.

In *Hellfeld* v. *Russian Government* (a decision of the Prussian Court of Competence Conflicts, A.J.I.L., 1911, p. 480), it was said

[1] Summary of the paper read to the Grotius Society by Dr. Erwin H. Loewenfeld on May 5, 1948. The full text of the paper will appear in Vol. 34 of the Society's *Transactions*.

that 'execution proceedings are not affected by the question of jurisdictional conflict in, of or by itself', and further, at p. 518 *l.c.* :

> 'The power to hear and determine and the power to award execution are not inseparably bound up together. And therefore the claim that in the submission to a complaint or to a counterclaim there is *ipso facto* contained the submission to execution is not justifiable.'

In *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen* (*United States Circuit Court of Appeals*) (decision of July 14, 1930, Ann.Dig. 1929–30 (Case 70), p. 109 and A.J.I.L. 1931, p. 336), a clear distinction was expressed between measures of jurisdiction and of execution and the first was affirmed whilst the second was denied. It related to a proceeding to enforce a judgment obtained by Dexter and Carpenter on their counterclaim against the Swedish Railways by writ of execution and order of attachment obtained against the funds of the Swedish Government in an American bank and debts owed to the Swedish Government. Upon application of the Swedish minister claiming immunity, the order of attachment and writ of execution were set aside and the decision was affirmed on appeal, *certiorari* being denied (282 U.S. 896). In delivering the opinion of the court, Judge Manton said : 'Consenting to be sued does not give consent to a seizure or attachment of the property of a sovereign Government. The clear weight of authority in this country as well as that of England and Continental Europe is against all seizures even though a valid judgment has been entered. To so hold is not depriving our own courts of any attribute of jurisdiction. It is but recognising the general international understanding that a sovereign person and property ought to be held free from seizure or molestation at all peaceful times and circumstances. When judgment has been rendered and the liability judicially ascertained, the power of the courts ends and the sovereign is at liberty to determine for himself whether or not to pay the judgment. It is hoped that the judgment of our courts will be respected and payment made by the Swedish Government'. The court cited with approval the case of *Hellfeld* v. *Russian Government* referred to above. A similar contention that consent to jurisdiction does not necessarily imply consent to execution was taken in an English appeal case, *Vavasseur* v. *Krupp* (1878), 9 Ch.D. 351. The court dealt with the question : assuming that the Mikado had brought himself into court as ordinary defendant, would this give that court jurisdiction to interfere with public property of Japan? The answer was no. It was similarly held in *Duff Development Co.* v. *Government of Kelantan* ([1924] A.C. 797) that there was no jurisdiction as to execution. The facts

of this case are well known. They concerned a lease of mining rights granted by the Government of Kelantan to the plaintiffs, which contained an arbitration clause and in which an award was made by the arbitrator in favour of the plaintiffs. It was held that the contract by which the Kelantan Government had agreed to arbitrate was not a submission to the jurisdiction of the High Court and execution could not be taken out on an arbitration award; although by statute that award had the effect of a judgment (only one Law Lord dissented).

The decision of the French 'Cour de Cassation' in *Spanish Government* v. *Lambège and Puyot* (the claim related to a bill of exchange clause) laid down that execution against a foreign State was inadmissible without the consent of that State (Dalloz, 1849, Part I, p. 5). This rule was subsequently followed in France with some uniformity, as referred to in *Annual Digest*, 1938–39, p. 242, where almost a page of decisions is cited as examples of the general principle of immunity of sovereign States from execution (amongst them, *Caratier-Terrasson* v. *Chemin de fer d'Alsace-Lorrain*, decided by the Cour de Cassation, Dalloz, 1885, Part. I, 341, and *Consort Ban Ajad* v. *Gouvernement de Tunis*, same court, *ibid.*, 1897, I, 305). The only exception to this rule is the decision of the same court in *Union of Socialist Soviet Republics* v. *Association France Export*, February 19, 1929, *ibid.*, 1930, I, 73, Sirey 1930; I, 49, and *Annual Digest*, 1929–30, case 7. It allowed a levy of execution against the Soviets in respect of acts of a private commercial nature. The decision is commented on by Niboyet in an article, 'Les immunités des Etats étrangers en droit français' (*Revue générale de droit international*) Vol. 43 (1936), where he says: 'Dans l'affaire récente de l'U.R.S.S. c'est pour la première fois en France qu'une saisie arrêtée a par contre été nettement validée'. He then states: 'On est en général assez d'accord pour reconnaître que l'immunité ne s'étend pas et ne s'est pas étendu dans le passé aux actions immobilières en revendication, confessoires, négatoires, possessoires et hypothéquaires'. This is to say, even Niboyet, who ranks as one of the most far-reaching authors who deny immunity, refers only to actions concerning immovables in order to establish title, recover property, enforce encumbrances or claims relating to any other private, *e.g.*, possessory nature (similarly, Reichsgericht, Vol. 103, p. 7). Nowhere does he mention claims of public nature and in particular interference with State property based on measures of expropriation.

Since Niboyet emphasised in 1936 that execution on the property of a foreign State had never, until then, formed the object

of a decision of a French court, it must be assumed that French courts will not allow execution except in special cases as the one against the Union of Soviets which since then has been followed by similar cases against Soviet trade delegations which were all dealt with on the basis of 'jure negotii' involving State-owned corporations where immunity was denied.

The principle of 'jure negotii' seems to have found recognition in a much-commented American decision (*Tennessee* v. *Chattanooga*, 68 Law Ed. U.S. 265, Supreme Court Reports of April 7, 1924). In 1837 the State of Georgia undertook the construction of a railway from Atlanta to Chattanooga. The legislature of Tennessee granted to Georgia the right-of-way and land for terminal facilities which were then on the outskirts of the city, but at the time of the decision, the terminal was found near the business centre, the town having grown to such a great extent. There was a claim for extending one of the principal streets of the City of Chattanooga through Georgia's railroad yard. Georgia denied the power of the city to condemn her right-of-way in order to extend the street. She alleged she had never consented to be sued in the court of Tennessee. The Supreme Court denied Georgia's claim to sovereign immunity. Its enterprise in Tennessee was regarded as a private enterprise. The court relied on the doctrine of 'tacit submission' and said: 'Having divested itself of its sovereign character and having taken on the character of those engaged in the railroad business in Tennessee, this amounted to a consent that Georgia may be condemned as may like property of others'. This decision is older than the leading case of Dexter and Carpenter, referred to above, and since it relies on tacit consent, it does not necessarily deviate from the principle expressed in the *Dexter Case*. Nevertheless, it was criticised by Hyde, *International Law*, II, p. 844, where he says: 'A State never acts in a private capacity, even when the activity in which it participates is one commonly carried on by the private individual'. It must, however, be admitted that the principle expressed in the *Chattanooga Case* has been followed by a line of recent Italian cases, *e.g.*, *Storelli* v. *French Republic*, Court of Rome (Giur.It., 1924, I, 2, 266 and A.D. 1923–24, p. 129).

Switzerland has wavered between complete immunity and qualified admission of execution. In a case published in the *Annual Digest* (1929–30, case No. 78, p. 121), the Swiss Federal Supreme Court said that 'while the exemption of foreign States from national jurisdiction is well recognised in regard to actions arising out of acts performed *jure imperii*, there is no unanimity with regard to litigation arising out of acts of private law.

Having regard to the opposition which has manifested itself in jurisprudence of many countries against the limitation of the principles of exemption, the Swiss practice would be ill advised to commit itself to such limitation'. The general principle was, however, upheld by a Geneva court in 1925 (*Revue de droit international privé*, Vol. 1926, p. 21) where it refused to enforce a contractor's lien on property of the League of Nations by pointing out 'that a judgment which against the will of the League would order the lien to be registered would violate the pact of the League of Nations and be unenforceable. Therefore, the court would ex-officio have to refuse to pronounce a judgment against the League, although the League voluntarily consented to be represented before the court'.

Under Czech law, not only buildings in which diplomatic offices are placed, but also dwellings of diplomatic persons are exempted from execution measures. In a decision of December 28, 1929 (A.D. 1927–1928, case No. 251, p. 372, Vaz. 9491), the Supreme Court of Czechoslovakia said that 'when a diplomatic person possesses in the country an agricultural estate for his own private purposes, such immovable property would not enjoy exemption'. The fact that the court used the words 'for his own private purposes' seems to indicate that if the estate were, wholly or partially, dedicated to public purposes, immunity from execution would be accorded.

In comparing and considering the various practices of the countries referred to, it could be stated that :—

(1) the real property of a foreign State is as a rule, subject to the jurisdiction of the *lex situs* for the purpose of determining title, recovering property, and enforcing encumbrances or possessory rights;

(2) The submission to the jurisdiction of the *lex situs* does not include subjection to measures of execution, garnishee orders or any other act of seizure or attachment or of ejection in case of expropriation;

(3) in countries which accept the principle of unqualified immunity of foreign States, measures of execution are not admitted, unless the foreign State has waived its immunity. The only exception is Czechoslovakia, where executions can be carried out except with regard to property dedicated, directly or indirectly, to the diplomatic service;

(4) in countries which accept the principle of qualified immunity, *e.g.*, France in the case of the claims against the Soviet Trade Delegation, Italy and U.S.A. in the *Chattanooga Case* (but there is not yet a definite practice), execution appears to be

admissible in so far as property is held *jure gestionis*, *e.g.*, for the purposes of trade corporations doing private business. But levy of execution in other cases is not permitted.

THE SAN FRANCISCO I.L.O. CONFERENCE

In the San Francisco Opera House (where three years ago the United Nations Conference was held), the International Labour Conference was convened on June 17 for its thirty-first session. In the Conference were represented all fifty-eight of I.L.O.'s Member States, including four which were admitted within the past two months : Pakistan, Burma, the Philippines, and El Salvador. Each delegation is ' tripartite ', being composed of two representatives of government, and one each of management and of labour.

Chief among the questions which the Conference considered during that session with the object of improving labour conditions, were the following :

Reports on the Application of Conventions.—The Conference examined the reports supplied by governments on the way in which they are implementing the Conventions they have ratified.

Employment Service Organisation.—The Conference considered the adoption of an International Labour Convention, as well as a recommendation, providing for national employment services. In 1933, the Conference adopted a Convention on Free-Charging Employment Agencies. The Conference considered revising this.

Vocational Guidance.—At this session, the Conference gave preliminary consideration to the question of vocational guidance with a view to framing international standards at the 1949 session.

Wages.—While the Conference was not expected to take any action on the subject, it discussed the question of wage policy. The question of fair-wage clauses in public contracts was given preliminary consideration with a view to final action next year. The same procedure will apply to protection of wages.

Freedom of Association and Protection of the Right to Organise. —The Conference considered a convention to safeguard freedom of association of workers and employers and to protect their right to organise. This question was first considered last year at the request of the Economic and Social Council.

Industrial Relations (Application of the Principles of the Right to Organise and Bargain Collectively, Collective Agreements, Conciliation and Arbitration, and Co-operation between the Public Authorities and Employers' and Workers' Organisations).—These

questions were all given preliminary consideration at this session. They involved such subjects as factory management committees, the closed shop, anti-union discrimination, intimidation of non-members, and the binding nature of arbitration awards.

Certain Conventions (Partial Revision of the Night Work (Women) Convention, 1919, and of the Night Work (Women) Convention (Revised) 1914; Partial Revision of the Night Work of Young Persons (Industry) Convention, 1919).—The Conference considered the adoption of revisions to the existing conventions on these subjects.

The results of this Conference will be duly published in the *International Labor Review*, issued monthly by the International Labour Office and now in its twenty-eighth year. It is a scientific periodical covering the field of labour and social policy from an international point of view with the object of keeping specialists in this domain informed of the progress of events and ideas throughout the world.

It contains general articles by experts on the staff of the Office and in different countries, summaries of official reports, and factual information relating to social and economic policy, industrial relations, employment, migration, conditions of work, social insurance and assistance, and the activities of employers' and workers' organisations. There is a statistical section with international tables devoted to employment and unemployment, wages, hours of work, and the cost of living.

REVIEW OF CASES

INTERNATIONAL COURT OF JUSTICE

YEAR 1948

May 28, 1948

Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)

Request for advisory opinion in virtue of Resolution of General Assembly of United Nations of November 17, 1947.—Request does not refer to actual vote but to statements made by a Member concerning the vote.—Request limited to the question whether the conditions in Article 4, paragraph 1, of the Charter are exhaustive. —Legal or political character of the question.—Competence of the Court to deal with questions in abstract terms.—Competence of the Court to interpret Article 4 of the Charter.—Legal character of the rules in Article 4.—Interpretation based on the natural meaning of terms.—Considerations extraneous to the conditions of Article 4. Considerations capable of being connected with these conditions.— Procedural character of paragraph 2 of Article 4.—Subordination of political organs to treaty provisions which govern them. Article 24 of the Charter.—Demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.—Individual consideration of every application for admission on its own merits.

ADVISORY OPINION

Present: *President:* Guerrero; *Vice-President:* Basdevant; *Judges:* Alvarez, Fabela, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov Read, Hsu Mo, Azevedo.

The court, composed as above, gives the following advisory opinion :

On November 17, 1947, the General Assembly of the United Nations adopted the following Resolution :

> '*The General Assembly,*
>
> *Considering* Article 4 of the Charter of the United Nations,
>
> *Considering* the exchange of views which has taken place in

the Security Council at its Two hundred and fourth, Two hundred and fifth and Two hundred and sixth Meetings, relating to the admission of certain States to membership in the United Nations,

Considering Article 96 of the Charter,

Requests the International Court of Justice to give an advisory opinion on the following question :

> Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognises the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

Instructs the Secretary-General to place at the disposal of the Court the records of the above-mentioned meetings of the Security Council.'

By a note dated November 24, 1947, and filed in the Registry on November 29, the Secretary-General of the United Nations transmitted to the Registrar a copy of the Resolution of the General Assembly. In a telegram sent on December 10, the Secretary-General informed the Registrar that the note of November 24 was to be regarded as the official notification and that certified true copies of the Resolution had been despatched. These copies reached the Registry on December 12, and the question was then entered in the General List under No. 3.

The same day, the Registrar gave notice of the request for an opinion to all States entitled to appear before the Court, in accordance with paragraph 1 of Article 66 of the Statute. Furthermore, as the question put mentioned Article 4 of the Charter, the Registrar informed the Governments of Members of the United Nations, by means of a special and direct communication as provided in paragraph 2 of Article 66, that the Court was prepared to receive from them written statements on the question before February 9, 1948, the date fixed by an Order made on December 12, 1947, by the President, as the Court was not sitting.

By the date thus fixed, written statements were received from the following States : China, El Salvador, Guatemala, Honduras, India, Canada, United States of America, Greece, Yugoslavia,

Belgium, Iraq, Ukraine, Union of Soviet Socialist Republics, and Australia. These statements were communicated to all Members of the United Nations, who were informed that the President had fixed April 15, 1948, as the opening date of the oral proceedings. A statement from the Government of Siam, dated January 30, 1948, which was received in the Registry on February 14, *i.e.*, after the expiration of the time-limit, was accepted by decision of the President and was also transmitted to the other Members of the United Nations.

By its Resolution the General Assembly instructed the Secretary-General to place at the disposal of the Court the records of certain meetings of the Security Council. In accordance with these instructions and with paragraph 2 of Article 65 of the Statute, where it is laid down that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it, the Secretary-General sent to the Registry the documents which are enumerated in Section I of the list annexed to the present opinion.[1] A part of these documents reached the Registry on February 10, 1948, and the remainder on March 20. The Secretary-General also announced by a letter of February 12, 1948, that he had designated a representative, authorised to present any written and oral statements which might facilitate the Court's task.

Furthermore, the Governments of the French Republic, of the Federal People's Republic of Yugoslavia, of the Kingdom of Belgium, of the Czechoslovak Republic, and of the Republic of Poland announced that they had designated representatives to present oral statements before the Court.

By decision of the Court, the opening of the oral proceedings was postponed from April 15 to April 22, 1948. In the course of public sittings held on April 22, 23 and 24, the Court heard the oral statements presented

—on behalf of the Secretary-General of the United Nations, by its representative, Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department;

—on behalf of the Government of the French Republic, by its representative, M. Georges Scelle, Professor at the Faculty of Law of Paris;

—on behalf of the Government of the Federal People's Republic of Yugoslavia, by its representative, Mr. Milan Bartoš, Minister Plenipotentiary;

—on behalf of the Government of the Kingdom of Belgium, by its representative, M. Georges Kaeckenbeeck, D.C.L., Minister Plenipotentiary, Head of the Division for Peace Conferences and

[1] See p. 116.

International Organisation at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

—on behalf of the Government of the Republic of Czechoslovakia, by its representative, Mr. Vladimir Vochoč, Professor of International Law in Charles University at Prague;

—on behalf of the Government of the Republic of Poland, by its representative, Mr. Manfred Lachs, *Professeur agrégé* of International Law at the University of Warsaw.

In the course of the hearings, new documents were filed by the representatives accredited to the Court. These documents are enumerated in Section II of the list annexed to the present opinion.[2]

* * *

Before examining the request for an opinion, the Court considers it necessary to make the following preliminary remarks :

The question put to the Court is divided into two parts, of which the second begins with the words ' In particular ', and is presented as an application of a more general idea implicit in the first.

The request for an opinion does not refer to the actual vote. Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court's opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control. Nor does the request concern a Member's freedom of expressing its opinion. Since it concerns a condition or conditions on which a Member ' makes its consent dependent ', the question can only relate to the statements made by a Member concerning the vote it proposes to give.

It is clear from the General Assembly's Resolution of November 17, 1947, that the Court is not called upon either to define the meaning and scope of the conditions on which admission is made dependent, or to specify the elements which may serve in a concrete case to verify the existence of the requisite conditions.

The clause of the General Assembly's Resolution, referring to ' the exchange of views which has taken place . . .', is not understood as an invitation to the Court to say whether the views thus referred to are well founded or otherwise. The abstract form in which the question is stated precludes such an interpretation.

The question put is in effect confined to the following point only: are the conditions stated in paragraph 1 of Article 4 exhaustive in character in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make

[2] See p. 119.

admission dependent on conditions not expressly provided for in that Article, while a negative reply would, on the contrary, authorise a Member to make admission dependent also on other conditions.

* * *

Understood in this light, the question, in its two parts, is and can only be a purely legal one. To determine the meaning of a treaty provision—to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein—is a problem of interpretation and consequently a legal question.

It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.

It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.

Lastly, it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, 'the principal judicial organ of the United Nations', to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

Accordingly, the Court holds that it is competent, on the basis of Article 96 of the Charter and Article 65 of the Statute, and considers that there are no reasons why it should decline to answer the question put to it.

In framing this answer, it is necessary first to recall the 'conditions' required, under paragraph 1 of Article 4, of an applicant for admission. This provision reads as follows:

> 'Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.'

The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.

All these conditions are subject to the judgment of the Organisation. The judgment of the Organisation means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members. The question put is concerned with the individual attitude of each Member called upon to pronounce itself on the question of admission.

Having been asked to determine the character, exhaustive or otherwise, of the conditions stated in Article 4, the Court must in the first place consider the text of that Article. The English and French texts of paragraph 1 of Article 4 have the same meaning, and it is impossible to find any conflict between them. The text of this paragraph, by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused; for the text does not differentiate between these two cases and any attempt to restrict it to one of them would be purely arbitrary.

The terms 'Membership in the United Nations is open to all other peace-loving States which . . .' and '*Peuvent devenir Membres des Nations Unies tous autres États pacifiques*', indicate that States which fulfil the conditions stated have the qualifications requisite for admission. The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph 1 of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.

Nor can it be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them, and prevent the admission of an applicant which fulfills them. Such an interpretation would

be inconsistent with the terms of paragraph 2 of Article 4, which provide for the admission of ' *tout État* remplissant ces conditions ' —' any *such* State '. It would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions. Such a power would be inconsistent with the very character of paragraph 1 of Article 4 which, by reason of the close connection which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States. To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established.

Moreover, the spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them. If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the conditions laid down therein, they would undoubtedly have adopted a different wording.

The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.

The Court furthermore observes that Rule 60 of the Provisional Rules of Procedure of the Security Council is based on this interpretation. The first paragraph of this Rule reads as follows :

> ' The Security Council shall decide whether in its judgment the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter, and accordingly whether to recommend the applicant State for membership '.

It does not, however, follow from the exhaustive character of paragraph 1 of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified.

Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor—that is to say, none connected with the conditions of admission—is excluded.

It has been sought to deduce either from the second paragraph of Article 4, or from the political character of the organ recommending or deciding upon admission, arguments in favour of an

interpretation of paragraph 1 of Article 4, to the effect that the fulfilment of the conditions provided for in that Article is necessary before the admission of a State can be recommended or decided upon, but that it does not preclude the Members of the Organisation from advancing considerations of political expediency, extraneous to the conditions of Article 4.

But paragraph 2 is concerned only with the procedure for admission, while the preceding paragraph lays down the substantive law. This procedural character is clearly indicated by the words 'will be effected', which, by linking admission to the decision, point clearly to the fact that the paragraph is solely concerned with the manner in which admission is effected, and not with the subject of the judgment of the Organisation, nor with the nature of the appreciation involved in that judgment, these two questions being dealt with in the preceding paragraph. Moreover, this paragraph, in referring to the 'recommendation' of the Security Council and the 'decision' of the General Assembly, is designed only to determine the respective functions of these two organs which consist in pronouncing upon the question whether or not the applicant State shall be admitted to membership after having established whether or not the prescribed conditions are fulfilled.

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution. In this case, the limits of this freedom are fixed by Article 4 and allow for a wide liberty of appreciation. There is therefore no conflict between the functions of the political organs, on the one hand, and the exhaustive character of the prescribed conditions, on the other.

It has been sought to base on the political responsibilities assumed by the Security Council, in virtue of Article 24 of the Charter, an argument justifying the necessity for according to the Security Council as well as to the General Assembly complete freedom of appreciation in connection with the admission of new Members. But Article 24, owing to the very general nature of its terms, cannot, in the absence of any provision, affect the special rules for admission which emerge from Article 4.

The foregoing considerations establish the exhaustive character of the conditions prescribed in Article 4.

* * *

The second part of the question concerns a demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.

Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category from those conditions, since it makes admission dependent, not on the conditions required of applicants, qualifications which are supposed to be fulfilled, but on an extraneous consideration concerning States other than the applicant State.

The provisions of Article 4 necessarily imply that every application for admission should be examined and voted on separately and on its own merits; otherwise it would be impossible to determine whether a particular applicant fulfils the necessary conditions. To subject an affirmative vote for the admission of an applicant State to the condition that other States be admitted with that State would prevent Members from exercising their judgment in each case with complete liberty, within the scope of the prescribed conditions. Such a demand is incompatible with the letter and spirit of Article 4 of the Charter.

FOR THESE REASONS,

THE COURT,

by nine votes to six,

is of opinion that a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article;

and that, in particular, a Member of the Organisation cannot, while it recognises the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State.

The present opinion has been drawn up in French and in English, the French text being authoritative.

Done at the Peace Palace, The Hague, this twenty-eighth day of May, one thousand nine hundred and forty-eight, in two copies, one of which shall be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(*Signed*) J. G. GUERRERO,
President.

(*Signed*) E. HAMBRO,
Registrar.

Judges Alvarez and Azevedo, whilst concurring in the opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the opinion a statement of their individual opinion.

Judges Basdevant, Winiarski, McNair, Read, Zoričić and Krylov, declaring that they are unable to concur in the opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the opinion a statement of their dissenting opinion.

(*Initialled*) J. G. G.
(*Initialled*) E. H.

Individual opinion by M. Alvarez.

I. I do not agree with the method adopted by the Court in giving the opinion for which it has been asked by the General Assembly of the United Nations.

The Court has inferred from the enumeration of the conditions prescribed in Article 4, paragraph 1 of the Charter for the admission of a State to membership in the United Nations, that nothing else can be adduced to justify a negative vote. This question cannot be answered merely by a clarification of the texts, nor by a study of the preparatory work; another method must be adopted and, in particular, recourse must be had to the great principles of the new international law.

More changes have taken place in international life since the last great social cataclysm than would normally occur in a century. Moreover, this life is evolving at a vertiginous speed: inter-State relations are becoming more and more various and complex. The fundamental principles of international law are passing through a serious crisis, and this necessitates its reconstruction. A new international law is developing, which embodies not only this reconstruction, but also some entirely new elements.

For a long time past I have insisted on the role which the Court must play in the renewal and development of international law. A recent event supports my opinion. The General Assembly of the United Nations in its Resolution No. 171 of November 14, 1947, declares that it is of paramount importance, in the first place, that the interpretation of the Charter should be based on recognised principles of international law and, in the second place, that the Court should be utilised, to the greatest practicable extent, in the progressive development of this law, both in regard to legal issues between States and in regard to constitutional interpretation or to questions of a general nature submitted to it for its opinion.

I hold that in this connection the Court has a free hand to allow scope to the new spirit which is evolving in contact with the new conditions of international life : there must be a renewal of international law corresponding to the renewal of this life.

With regard to the interpretation of legal texts, it is to be observed that, while in some cases preparatory work plays an important part, as a rule this is not the case. The reason lies in the fact that delegates, in discussing a subject, express the most varied views on certain matters and often without a sufficient knowledge of them; sometimes also they change their views without expressly saying so. The preparatory work on the constitution of the United Nations Organisation is of but little value. Moreover, the fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.

II. As the question put to the Court concerns the admission of new States to the United Nations Organisation, the character of the international community and the place in it occupied by the Organisation must be borne in mind.

As a result of the increasingly closer relations between States, which have led to their ever greater interdependence, the old *community* of nations has been transformed into a veritable international *society*, though it has neither an executive power, nor a legislative power, nor yet a judicial power, which are the characteristics of a national society, but not of international society. This society comprises all States throughout the world without there being any need for consent on their part or on that of other States; it has aims and interests of its own; States no longer have an absolute sovereignty but are interdependent; they have not only rights, but also *duties* towards each other and towards this society; finally, the latter is organised and governed, to an ever increasing extent, by a law of a character quite different from that of customary law.

The foregoing indicates the place occupied by the United Nations Organisation in the universal international society. The creation of the League of Nations constituted a great effort to organise this society, particularly from the standpoint of the maintenance of peace. The present United Nations Organisation, which is destined to replace it and has the same aims, is therefore merely an institution within the universal international society.

The aims of this Organisation are not confined to certain States or to a great number of States, but are of a world-wide nature. They are concerned with the maintenance of peace and the development of co-operation among all States of the world; it will suffice to read the Preamble and Chapter I of the Charter to appreciate this.

But to become a Member of this Organisation, a State must apply for admission, must fulfil certain conditions and must be admitted by the Organisation. States which are not yet Members of the Organisation have not the rights and duties which it has laid down, but they have these conferred or imposed upon them as members of the universal society of nations. Moreover, such States may enter into relations of every kind with those which belong to the United Nations Organisation, and these relations are governed by international law.

III. Before giving the opinion asked of it by the General Assembly of the United Nations, the Court has had to make up its mind as to the legal or political character of the question put.

The traditional distinction between what is legal and what is political, and between law and politics, has today been profoundly modified. Formerly, everything dependent on precepts of law was regarded as legal and anything left to the free will of States was regarded as political.

Relations between States have become multiple and complex. As a result, they present a variety of aspects : legal, political, economic, social, etc.; there are, therefore, no more strictly legal issues. Moreover, many questions regarded as essentially legal, such as the interpretation of a treaty, may, in certain cases, assume a political character, especially in the case of a peace treaty. Again, many questions have both a legal and a political character, notably those relating to international organisation.

A new conception of law in general, and particularly of international law, has also emerged. The traditionally *juridical* and *individualistic* conception of law is being progressively superseded by the following conception : in the first place, international law is not strictly juridical; it is also political, economic, social and psychological; hence, all the fundamental elements of traditional individualistic law are profoundly modified, a fact which necessitates their reconstruction. In the next place, strictly individualistic international law is being more and more superseded by what may be termed the *law of social interdependence*. The latter is the outcome, not of theory, but of the realities of international life and of the juridical conscience of the nations. The Court is the most authoritative organ for the expression of this juridical conscience,

which also finds expression in certain treaties, in the most recent national legislative measures and in certain resolutions of associations devoted to the study of international law.

This *law of social interdependence* has certain characteristics of which the following are the most essential : (*a*) it is concerned not only with the delimitation of the rights of States, but also with harmonising them; (*b*) in every question it takes into account all its various aspects; (*c*) it takes the general interest fully into account; (*d*) it emphasises the notion of the *duties* of States, not only towards each other but also towards the international society; (*e*) it condemns the abuse of right; (*f*) it adjusts itself to the necessities of international life and evolves together with it; accordingly, it is in harmony with policy; (*g*) to the rights conferred by strictly juridical law it adds that which States possess to belong to the international organisation which is being set up.

Far therefore from being in opposition to each other, law and policy are today closely linked together. The latter is not always the selfish and arbitrary policy of States; there is also a collective or individual policy inspired by the general interest. This policy now exercises a profound influence on international law; it either confirms it or endows it with new life, or even opposes it if it appears out of date. It is also one of the elements governing the relations between States when no legal precepts exist.

It is, however, always necessary to differentiate between juridical and political elements, particularly from the standpoint of the Court's jurisdiction.

The United Nations Charter makes the Court one of its organs (Art. 7), and Article 92 lays down that it is its principal judicial organ. The Statute of the present Court, like that of the old, indicates that its task is to hear and determine legal questions, and not political questions. The advisory opinions for which it may be asked must also relate to legal questions (Articles 36, No. 3, and 96 of the Charter; Article 65 of the Statute of the Court).

When a question is referred to the Court, the latter therefore must decide whether its dominant element is legal, and whether it should accordingly deal with it, or whether the political element is dominant and, in that case, it must declare that it has no jurisdiction.

In the questions which it is called upon to consider, the Court must, however, take into account all aspects of the matter, including the political aspect when it is closely bound up with the legal aspect. It would be a manifest mistake to seek to limit the Court to consideration of questions solely from their legal aspect, to the

exclusion of other aspects; it would be inconsistent with the realities of international life.

It follows from the foregoing that the constitutional Charter cannot be interpreted according to a strictly legal criterion; another and broader criterion must be employed and room left, if need be, for political considerations.

The Court has decided that the question on which its advisory opinion has been asked is a legal one because it concerns the interpretation of the Charter of the United Nations, which is a treaty.

In reality, this question is both legal and political, but the legal element predominates, not so much because it is a matter of interpreting the Charter but because it is concerned with the problem whether States have a *right* to membership in the United Nations Organisation if they fulfil the conditions required by the Statute of the Organisation. The question is at the same time a political one, because it is the States comprising the Security Council and those belonging to the General Assembly which determine whether these conditions are, or are not, fulfilled by the applicant.

IV. As regards the essential conditions to be fulfilled by every State desiring to be admitted to membership in the United Nations Organisation, these are prescribed in Article 4, paragraph 1 of the Charter. These conditions are exhaustive because they are the only ones enumerated. If it had been intended to require others, this would have been expressly stated.

Moreover, having regard to the nature of the universal international society, the purposes of the United Nations Organisation and its mission of universality, it must be held that all States fulfilling the conditions required by Article 4 of the Charter have a *right* to membership in that Organisation. The exercise of this right cannot be blocked by the imposition of other conditions not expressly provided for by the Charter, by international law or by a convention, or on grounds of a political nature.

Nevertheless, it has to be judged in each case whether the conditions of admission required by the Charter are fulfilled. The units which may form this judgment are the States composing the Security Council and the members of the General Assembly. They must be guided solely by considerations of justice and good faith, *i.e.*, they must confine themselves to considering whether the applicant fulfils the conditions required by Article 4, paragraph 1. In actual fact, however, these States are mainly guided by considerations of their own policy and, consequently, if not directly,

at all events indirectly, they sometimes require of an applicant conditions other than those provided for in Article 4, since they vote against its admission if such other conditions are not fulfilled. That is an abuse of right which the Court must condemn; but at the present time no sanction attaches to it save the reprobation of public opinion.

Nevertheless, cases may arise in which the admission of a State is liable to disturb the international situation, or at all events the international organisation, for instance, if such admission would give a very great influence to certain groups of States, or produce profound divergencies between them. Consequently, even if the conditions of admission are fulfilled by an applicant, admission may be refused. In such cases, the question is no longer a legal one; it becomes a political one and must be regarded as such. In a concrete case of this kind, the Court must declare that it has no jurisdiction.

A claim by a Member of the United Nations Organisation, which recognises the conditions of Article 4 of the Charter to be fulfilled by an applicant State, to subject its affirmative vote to the condition that other States be admitted to membership together with this applicant, would be an act contrary to the letter and spirit of the Charter. Nevertheless, such a claim may be justified in exceptional circumstances, for instance, in the case of applications for admission by two or more States simultaneously brought into existence as the result of the disappearance of the State or colony of which they formed part. It is natural in that case that their admission should be considered simultaneously.

V. Having regard for the the foregoing, I consider that the following replies should be given to the actual questions put in the request for an advisory opinion addressed to the Court:

1° No State is *juridically* entitled to make its consent to the admission of a new Member to the United Nations Organisation dependent on conditions not expressly provided for by Article 4, paragraph 1, of the Charter.

2° A State may not, while recognising the conditions required by Article 4, paragraph 1, of the Charter to be fulfilled by the applicant State, subject its affirmative vote to the condition that other States be admitted to membership in the United Nations together with that State. Nevertheless, in exceptional cases, such a claim may be justified.

To the above conclusions the following, which ensues from them, should be added.

If there are several simultaneous applications for admission, each must be considered separately, save in exceptional circumstances: there is no ground for establishing a connection between them not contemplated by the Charter.

The foregoing statement clearly demonstrates the importance of the new method indicated above, and of the role which the Court is called upon to play in the development of international life and of international law. In consequence of Resolution 171 of November 14, 1947, adopted by the General Assembly of the United Nations, this method and this role emerge from the domain of doctrine and become applicable in practice.

(*Signed*) Alvarez.

Individual opinion by M. Azevedo.

1. I agree with the findings of the Court, and the purpose of the following remarks is merely to explain certain reasons which I should like to add to the opinion.

I would begin by referring to my previous view, that I am convinced that a radical change was made by the Charter in the matter of advisory opinions. I also have in mind the revision of Article 82 and the abolition of Article 83 of the Rules of Court, to prevent any request disguised as an opinion.

If the function of adviser given to a Court of Justice offends certain deep-rooted convictions, there is something even stranger in my view; it is the *tertium genus* which has always impeded the clear application of the rule laid down in Article 14 of the 1919 Covenant, as may be seen by reading the commentaries of those who studied the problem (Bassett Moore, Hudson, De Visscher, Negulesco, Ténékidès, Dauvergne, Beuve-Méry, Remlinger, etc.).

The expressions 'any dispute or any point' have given rise to the anomaly of settling a dispute without having the authority of a judgment and sometimes without the consent of the interested parties; in this way, the principle of voluntary jurisdiction, which was at the basis of the system, ran the risk of disappearing as the result of a diversion which was easy to undertake.

In order to forestall such consequences, the Charter substituted for these expressions simply the term 'any legal question' (in English no change was necessary, because the word *question* already corresponded with the French *point*).

In my view, this strange notion which has been called 'advisory arbitration' has now disappeared, as well as the participation of judges *ad hoc* in advisory opinions. The disturbing element having been removed, the advisory function of the Court will assume great importance, and the Court will not have to settle genuine disputes

by a strange and indirect method, a sort of travesty of contentious procedure.

Grant Gilmore, in emphasising the reduction of jurisdiction brought about by the Charter, has observed that the contentious cases decided by the old Court, being more or less linked to the consent of the parties, generally had only secondary importance, while those matters which were decided by advisory opinion were much more interesting. (*Yale Law Journal*, August 1946. *The International Court of Justice*, pp. 1053, 1054 and 1064.)

That a Court should be asked for an opinion on theoretical questions may seem strange. But it must not be forgotten that the International Court of Justice has a double character: that of tribunal, and that of counsellor. And it is quite fitting for an advisory body to give an answer *in abstracto* which may eventually be applied to several *de facto* situations: *minima circumstantia facti magnam diversitatem juris.*

It is true that Manley Hudson made the point that the Permanent Court never deviated from the facts (*The Permanent Court of International Justice*, 1933, para. 470, pp. 495–496, and note 69), but he admits too that in Advisory Opinion No. 1 the question had already been decided by the International Labour Office, and that the request for the opinion had as its sole purpose the establishment of a criterion for the future (Hudson, *op. cit.*, p. 497, P.C.I.J., Series B, No. 1, p. 14).

Any request—apart from a quite artificial attitude, which cannot be presumed—always arises from or is influenced by facts, but it is also possible to eliminate the concrete elements, so as to reveal an isolated point of doctrine.

In the original report by Lapradelle, in 1920, an abstract request was already contemplated in connection with the distinction between a 'point', on the one hand, which was always limited to a question of pure, theoretical law, and, on the other hand, a 'dispute', which had arisen from a concrete disagreement, already in existence.

Such a distinction therefore corresponds to the idea held by the founders of the Court, and it was clearly indicated in the plan proposed in 1920 by the Brazilian jurist Clovis Bevilacqua. It is for all these reasons that the Permanent Court could say:

> 'There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil.' (P.C.I.J., Series A, No. 7, pp. 18–19; Series B, No. 1, p. 24.)

It is even preferable that the Court should ignore disputes that

have given rise to any particular question. The Court would not then be led to incur responsibility by departing from its normal duty; the Court would thus leave a wider field of appreciation open to the body which would have to apply the convention without slighting the prestige of the tribunal.

2. I am glad to note that the first opinion for which the Court is asked affords a perfect example of the manner in which I would wish questions always to be put. The Court has not even had above all to ' consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States ', as required by Article 82 of the Rules.

It is true that one of the recitals at the head of the resolution adopted by the General Assembly refers in precise terms to what happened in certain meetings of the Security Council, but if the questions asked are clear enough to make a complete answer possible, the Court is not bound by mere recitals.

On the other hand, if the Court chose to know the facts, it would not be limited, and would be free to inform itself not partially, but completely. That is why the Secretary-General did not send to the Court only the minutes of the three meetings referred to, but sent copious documentation, which the Assistant Secretary-General in charge of the Legal Department used in his oral statement.

Thus, the examination of these documents, as of all other elements which we have been able to examine for the purpose of investigation, convinces us even further that we should make a purely theoretical study of the question, so as to enable the Court without the assistance of any individual or State, to give an opinion of which the effects would be applicable to all Members of the Organisation.

In fact, it can be seen, by examining the whole history of the Security Council and of the General Assembly, since the United Nations was founded two years ago, that almost the same arguments have been used and the same criticism reproduced alternatively by the representatives of certain States who found themselves, by the force of circumstances, in similar, though opposite, situations.

The discussion which began in the Security Council at the end of August 1946 might even be compared to that which had already taken place in the same body in January 1946; this made it possible for John Hazard to write about the idea of bargaining in the admission of Members even before the question really came up in the United Nations. (*Yale Law Journal*, *cit.*, p. 1031.)

3. By applying an objective criterion faithfully, any legal question can be examined without considering the political elements which may, in some proportion, be involved.

Objection to the political aspect of a case is familiar to domestic tribunals in cases arising from the discretionary action of governments, but the Courts always have a sure means of rejecting the *non liquet* and of acting in the penumbra which separates the legal and the political, in the endeavour to protect individual rights.

In my country, an eminent jurist who was also a member of this Court, Ruy Barbosa, examined the problem fully in the light of comparative law (*Direito do Amazonas ao Acre*, Rio de Janeiro, 1910); it is particularly interesting to see in his work how, for instance, the history of the Washington Court from the beginning of the country's autonomous existence, through the war of Secession, until 1937, and the adoption of the *New Deal* by Franklin Roosevelt, affords useful information.

The decisions known as the 'Insular Cases' have been ably commented on. C. F. Randolph, for instance, states that 'these may be momentous political questions without the precincts of the Court; within, they are simple judicial questions'. (*The Law and Policies of Annexation*, p. 105.)

But the possibility of a separation of the two aspects is still admitted in other countries, whose juridical systems are quite different from those of America. In this connection, the activity of the French Council of State might be mentioned; its jurisprudence embraces a constantly widening field.

If we move into the field of international law, we observe that, outside the general wishes expressed in the Preamble, the Charter of the United Nations reminds us that the adjustment or settlement of international disputes or situations which might lead to a breach of the peace is to be brought about by peaceful means, and in conformity with the principles of justice and international law (Article 1, para. 1).

The good faith in which the obligations assumed in accordance with the Charter shall be fulfilled is also mentioned (Article 2, para. 2), as well as the duty of the Security Council to act in accordance with the purposes and principles of the United Nations (Article 24, para. 2).

Consequently, it cannot be denied that the United Nations rests essentially on legal foundations; the sovereign equality of States is restricted, in order to promote harmony among peoples (P.C.I.J., Series B, No. 13, p. 22), and it must be admitted that all nations, large or small, have had to limit their international activities.

The most typically political acts, such as the declaration of war, are subject to ingeniously linked 'abortive' measures; on the other hand, the power to conclude treaties is regulated (Article 103).

In such conditions, the discretionary powers which are expressly

granted, or which can filter through numerous flexible provisions, always come up against limitations and must, in addition, be exercised with a view to the aims of this legal order.

This is why the legal examination of questions can be extended to the frontiers of political action, although (as certain great minds would wish) the abolition of *non-justiciable* disputes has not yet been attained.

In the present case, the legal question is clearly apparent, and the Court can decide it without inquiring whether hidden political motives have been introduced or not, in the same way as the old Court has done in the Opinion No. 23:

> 'The Court . . . is called upon to perform a judicial function, and . . . there appears to be no room for the discussion and application of political principles or social theories . . .'. (Series B, No. 13, p. 23.)

4. Passing to the examination of the particular case, and dismissing the notion of the universality of the United Nations, an ideal which has not yet become a guiding rule for the admission of new Members, the following question must first be considered: whether there exists, or not, a subjective right to be admitted to this international society.

In favour of an affirmative answer, it has been suggested that the notion of an obligation in favour of third parties should be applied by analogy; such a notion has been adopted in several treaties, and also by various international groups, such as the Industrial Property Group, to which each country is free to adhere, such adherence being sufficient for the country to begin to enjoy its rights and assume its obligations.

But here the act involved is not unilateral, but manifestly bilateral; and it is complete only when the request for admission has been accepted by the principal organs of the United Nations.

Such a request is binding only on the applicant, and even if it is founded on the existence of the qualifications required by the Charter, the candidate cannot himself judge whether the conditions are fulfilled in conformity with Article 4. This is the task of the Organisation, which may, or may not, accept the proposal by a judgment which it alone can render.

Therefore it is not a question of right, but simply of interest, which may, however, be transformed later by the judgment in question.

The conditions for admission, as deliberately laid down, are so broad and flexible that the recommendations and decisions relating thereto necessarily contain a strong arbitrary element.

It would be difficult to say that any one of the required

conditions has a purely objective character, and that it could be appraised algebraically; and despite the place allotted to the word ' judgment ', it is precisely in the matter of the peace-loving nature of a State that a wide scope has been given to the political views of those who are called upon to pronounce themselves.

Motives of all kinds, tending to unite or separate men and countries, will slip through the remaining loopholes; all kinds of prejudices, and even physical repugnance will find a way of influencing the decision, either by an act of the will or even through the action of the subconscious. Each appraisal will be psychologically determined according to the criterion applied by each voter.

It would be vain to require in practice that the representatives of States should act exclusively according to ideal and abstract considerations, seeing that at the basis of every social organisation there are only men, whose virtues and faults, individually or collectively, are almost the same.

The philosophical quarrel of the ' universals ' has not succeeded, through the centuries, in giving any other basis to human groups, in spite of the effect of nominalist, realist and conceptualist doctrines on legal personality, or on the institutional organism.

In short, all political considerations may intervene in determining the judgment of the organs of the United Nations regarding the qualifications laid down in Article 4 of the Charter. Hence, objections that have been raised regarding the protection of the rights of man, the attitude of countries during the last war, the extent of diplomatic relations, etc., may, in principle, justify the rejection of an application.

The idea arose in the San Francisco Conference itself, which approved, by acclamation, a proposal that countries whose governments had been established with the aid of the military force of countries that had fought against the United Nations, should be held not to fulfil the required conditions.

A direct reference to democratic institutions was avoided, roughly in the terms adopted at the Teheran Conference of 1943 (Goodrich and Hambro, *Charter of the United Nations*, p. 80), in order not to intervene in or even meddle with the domestic affairs of a country; but the report itself, which expressed such fears, did not fail to stress that such an appraisal might be made when judgment as to the required qualifications was given. (U.N.C.I.O., Committee I/2, Doc. 1160, Vol. VII, p. 316.)

5. On the other hand, it must be admitted that the examination of candidatures has been limited by determining all the requirements that a candidate was obliged to fulfil; this was the *minimum* considered necessary to prevent arbitrary acts.

Consequently, the draft adopted differs essentially from that of the League of Nations, wherein no qualifications were required, nor was previous inquiry made into the candidates's past. The candidate was merely invited to enter into an engagement for the future by giving ('provided that') effective guarantees of its sincere intention to observe its international obligations. A more restrictive and less discretionary regime was better suited to the rule of law which the world was desirous of re-establishing after the Moscow declaration of the Four Powers in 1943, and after the Atlantic Charter.

If we look at their method of construction, we shall find that the builders of the San Francisco Charter, in order to avoid increasing the number of articles, decided to provide for express faculties in certain cases; thus, exceptions were made in regard to the important questions subject to a two-thirds majority (Charter, Article 18, para. 3), to territories to be brought under the trusteeship system (Article 77, para. 2), to non-member States which may become parties to the Statute (Article 93, para. 2), and to decisions *ex æquo et bono* (Statute, Article 38, para. 2).

But Article 4 forms no exception to conditions definitely laid down; as regards the absence of the word 'condition' in the English text, this does not change the system, if it be remembered that on several occasions, the same word, taken in the same sense, corresponds in English sometimes to *condition* (Charter, Article 93, and Statute, Article 4, paras. 2 and 3, and Articles 18 and 35), and sometimes to *qualification* (Statute, Articles 2 and 9).

The examination of all the documents leads to the conclusion that exhaustive interpretation has been current in the practice of the organs of the United Nations, the Members of which have reciprocally made complaints on the subject of requirements lying outside the scope fixed by Article 4. It has never been asserted that a country fulfilling all the legal conditions might nevertheless not be admitted, because other conditions were not fulfilled; on the other hand it has always been stated that the absence of such qualifications prevented the fulfilment of the conditions prescribed by a provision that it was desired not to infringe.

And if I were not faced with an abstract question, and, consequently, if I had to take facts into account, I should consider that allegations which might be the basis of the first question asked have not been proved.

6. Having established that the required conditions are fixed, it might still be possible—having regard to the doctrine of the relativity of rights already accepted in international law (P.C.I.J., Series A, No. 7, p. 30; and No. 24, p. 2; Series A/B, No. 46,

p. 167)—to admit a kind of censorship for all cases in which there has been a misuse or, at any rate, abnormal use of power in the appreciation of the exhaustive list of qualities—even granting a wide scope to political considerations.

Any legal system involves limitations and is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped.

This is a long-established principle, and has served, during centuries, to limit the scope of the principle *qui suo jure utitur neminem laedit.*

The concept of the misuse of rights has now been freed from the classical notions of *dolus* and *culpa*; in the last stage of the problem an inquiry into intention may be discarded and attention may be given solely to the objective aspect; *i.e.*, it may be presumed that the right in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law. (Cf. Swiss Civil Code, Art. 2; Soviet, Art. 1; and Brazilian, Art. 160).

There are even restrictions on arbitrary decision. It would, no doubt, be difficult to fix limits *a priori*, though examples might easily be given; *e.g.*, could Switzerland be regarded as a non-peace-loving country? Could policy override the law to such an extent?

In another field, it might also be asked how the United Nations could continue to function if the reservation in the Charter regarding domestic jurisdiction was subject to no control.

But here there would be no need to seek for reasons; for the Court has before it a theoretical opinion. In any case, it would be a very difficult task to perform, because the Members voting are not bound to state their reasons.

Of course, if they choose to express their motives, they themselves would open the way to the examination of the restrictions, by transforming an abstract act into a causal act (as sometimes happens in private law in the case of certain forms of bonds), in such a way that an inquiry would be possible into the existence and authenticity of a particular cause. The *falsa demonstratio* may thus vitiate the act when it is subordinated to a certain motive.

It is true that it has been maintained that the statement of reasons is not merely an act of courtesy, but the fulfilment of a duty which enables the Assembly to know the reasons for a refusal. But if the great majority of the Members of the United Nations hold that the Security Council's recommendation is a condition *sine qua non* for the admission of a Member by the Assembly, it

would be useless for the latter to verify the reasons that the Council might have had for not reporting favourably on the application.

7. The request for an opinion is not confined to a general point. It also contains a particular question, namely, the hypothetical case in which an affirmative vote is made subject to simultaneous admission of other States. Such an attitude has been alleged directly or indirectly, clearly or in a disguised manner, on several occasions.

But there is no question of a simple example or corollary, which would make a special reply superfluous; on the contrary, the second question is, from its nature, not wholly included in the first. There is a change of plane from the individual to the collective, and this is not legally justified, if arbitrary action is excluded; there is a change from the consideration of the qualities inherent in a certain candidate, to circumstances foreign to that candidate and concerned with the interests of third parties.

Once it is admitted that a State has proved that it has all the required qualifications, a refusal to accept its application might be considered tantamount to a violation, not only of an interest, but of a right already established, the acceptance of the State having been recognised, by final judgment, to be fully justified.

The most weighty reasons, such as the validity of a prior international undertaking, even if that undertaking bound all the members of the United Nations, could not, in any case, justify the abandonment of a rule of law as an act of retortion. It would, in law, be equally abnormal to refuse admission in order to avoid acting unjustly towards a third party, or to defend oneself against action considered to be arbitrary, as it would be to demand compensatory advantages from a candidate.

8. Having completely covered the question in its true limits, a judge will have fulfilled his duty if he gives a legal answer as to the law, independent of facts and without commenting on the attitude of any particular State (P.C.I.J., Series B, No. 13, p. 24).

If he does so, he will not hinder the political activity of the organs that are responsible for the maintenance of peace; for elements of expediency, manifest or hidden, can always be considered when reasonable use is made of the wide possibilities opened by Article 4 of the Charter. Respect for law must never constitute a reason for disturbing international harmony, nor cause an upheaval in the life of any society.

(*Signed*) Philadelpho Azevedo.

Dissenting opinion of Judges Basdevant, Winiarski, Sir Arnold McNair and Read.

1. We regret that, while we concur in the opinion of the majority

of the members of the Court as to the legal character of the first question, as to the power of the Court to answer it and the desirability of doing so, and as to the competence of the Court to give any interpretation of the Charter thereby involved, we are unable to concur in the answer given by the majority to either question, and we wish to state our reasons for not doing so.

2. The request made to the Court for an advisory opinion is as follows :

> 'Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognises the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?'

There are two questions and we shall begin by examining the first.

3. In our opinion it is impossible to regard the first question as one which relates solely to the statements or the arguments which a Member of the United Nations may make or put forward in the Security Council or in the General Assembly when those organs are considering a request for admission, and not to the reasons on which that Member bases its vote. The Court is asked whether a Member is 'juridically entitled to make its consent to the admission' dependent on conditions not provided for by paragraph 1 of Article 4. Its consent to admission is expressed by its vote. It is therefore the vote that is in question, as is confirmed by the expression 'subject its affirmative vote' used in the second question, which is complementary to the first. But it would be a strange interpretation which gave a Member freedom to base its vote upon a certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote. Such a result would not conduce to that frank exchange of views which is an essential condition of the healthy functioning of an international organisation. It is true that it is not possible to fathom the hidden reasons for a vote, and there exists no legal machinery for rectifying a vote which may be cast contrary to the Charter in the Security Council or the General Assembly. But that does not mean that there are no rules of law governing Members of the United Nations in voting in either of these organs;

an example is to be found in paragraph 1 of Article 4 prohibiting the admission of a new Member which does not fulfil the qualifications specified therein. This distinction, which it has been attempted to introduce between the actual vote and the discussion preceding it, cannot be accepted; it woud be inconsistent with the actual terms of the question submitted to the Court, and its recognition would involve the risk of undermining that respect for good faith which must govern the discharge of the obligations contained in the Charter (Article 2, paragraph 2).

4. The question submitted to us is whether, apart from the qualifications expressly specified in paragraph 1 of Article 4, a Member of the United Nations is at liberty to choose the reasons on which it may base its vote or which it may invoke in the Security Council or the General Assembly in the course of the proceedings relating to an application for admission, or whether, on the other hand, that Member is forbidden to rely on considerations which are foreign to the qualifications specified in paragraph 1 of Article 4. The question has been put to us in terms of the conduct of a member of the United Nations in the Security Council or in the General Assembly; the Member is envisaged in its capacity as a member of these organs, that is to say, in the discharge of its duty to contribute to the making of a recommendation by the Security Council or of a decision by the General Assembly on that recommendation. The freedom of that Member in this respect cannot be either more or less than that of the organ as a member of which he is called upon to give his vote. Accordingly, in order to answer the question put with regard to the conduct of a member, we are compelled to begin by deciding what the answer should be in relation to the organ, be it the Security Council or the General Assembly.

5. The reason why the question stated has been submitted to the Court is that the relevant provisions did not seem to be clear enough to provide a simple and unambiguous answer to the question. Such, at any rate, was the view of the General Assembly and we share it. Accordingly, in our opinion, we are confronted with a question of interpretation and therefore we must apply the rules generally recognised in regard to the interpretation of treaties.

6. The relevant article of the Charter is No. 4, which is as follows:

> '1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.
>
> 2. The admission of any such State to membership in the

United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

Although the terms of the question as put to the Court by the General Assembly are confined to mentioning the first paragraph of this Article, its second paragraph is equally relevant, because it deals with the discussion and the voting in the Security Council and the General Assembly when examining a request for admission, and because it is the second paragraph which fixes the respective spheres of the Security Council and the General Assembly in this matter.

Moreover, it is a rule of interpretation which was well recognised and constantly applied by the Permanent Court of International Justice that a treaty provision should be read in its entirety.

Again, it must be placed in its legal context as supplied by the other provisions of the Charter and the principles of international law.

7. The first conclusion that emerges from a reading of Article 4 in its entirety is that the Charter does not follow the model of the multilateral treaties which create international unions and frequently contain an accession clause by virtue of which a declaration of accession made by a third State involves automatically the acquisition of membership of the union by that State. On the contrary, the Charter, following the example of the Covenant of the League of Nations and having due regard to the fact that it is designed to create a political international organisation, has adopted a different and more complex system, namely, the system of admission. Assuming that a request is made by a State desiring to be admitted, the system involves a decision by the General Assembly whereby admission ' will be effected '; this decision is taken upon a recommendation made by the Security Council; that recommendation cannot be made, and that decision cannot be taken, unless certain qualifications specified in paragraph 1 of Article 4 are possessed by the applicant State.

8. The essential feature of this system is the decision of the General Assembly whereby the admission ' will be effected '. The provisions of paragraph 2 of Article 4, which fix the respective powers of the General Assembly and the Security Council in this matter, do not treat the admission of new Members as a mere matter of the routine application of rules of admission. It would only be possible to attribute such a meaning to this Article if it had adopted a system of accession and not of admission; and if accession had been the system adopted it would have been better to have placed the Secretary-General in control of the procedure. This Article does not create a system of accession, but the entirely different system of admission. In the working of this system the

Charter requires the intervention of the two principal political organs of the United Nations, one for the purpose of making a recommendation and then the other for the purpose of effecting the admission. It is impossible by means of interpretation to regard these organs as mere pieces of procedural machinery like the Committee for Admissions established by the Security Council. In the system adopted by the Charter, admission is effected by the decision of the General Assembly, which can only act upon a recommendation of the Security Council, and after both these organs are satisfied that the applicant State possesses the qualifications required by paragraph 1 of Article 4.

9. The resolutions which embody either a recommendation or a decision in regard to admission are decisions of a political character; they emanate from political organs; by general consent they involve the examination of political factors, with a view to deciding whether the applicant State possesses the qualifications prescribed by paragraph 1 of Article 4; they produce a political effect by changing the condition of the applicant State in making it a Member of the United Nations. Upon the Security Council, whose duty it is to make the recommendation, there rests by the provisions of Article 24 of the Charter 'primary responsibility for the maintenance of international peace and security'—a purpose inscribed in Article 1 of the Charter as the first of the Purposes of the United Nations. The admission of a new Member is pre-eminently a political act, and a political act of the greatest importance.

The main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view. It follows that the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their vote upon political considerations. That is the position of a member of the Security Council or of the General Assembly who raises an objection based upon reasons other than the lack of one of the qualifications expressly required by paragraph 1 of Article 4.

That does not mean that no legal restriction is placed upon this liberty. We do not claim that a political organ and those who contribute to the formation of its decisions are emancipated from all duty to respect the law. The Security Council, the General Assembly and the Members who contribute by their votes to the decisions of these bodies are clearly bound to respect paragraph 1 of Article 4, and, in consequence, bound not to admit a State which fails to possess the conditions required in this paragraph.

But is there any other legal restriction upon the freedom which

in principle these organs enjoy in the choice of the reasons for their decisions, that is to say, upon the liberty which in principle a State enjoys in choosing the reasons for its decisions, and in this case, for its vote? Is there in this case a restriction consisting in a prohibition to oppose an application for admission on grounds foreign to the qualifications required by paragraph 1 of Article 4?

10. We must therefore decide whether there exists such a restriction upon the principle of law stated above.

There is a rule of interpretation frequently applied by the Permanent Court of International Justice, when confronted with a rule or principle of law, to the effect that no restriction upon this rule or principle can be presumed unless it has been clearly established, and that in case of doubt it is the rule or principle of law which must prevail. In the present case, before acknowledging the existence of any restriction upon the principle of the widest examination of requests for admission by the Security Council, the General Assembly and their members, it is necessary to show that such a restriction has been established beyond a doubt.

Can it therefore be said that the application of this principle is subject to a clearly established restriction precluding the putting forward, in the course of the examination of requests for admission, of considerations not expressly specified in paragraph 1 of Article 4?

11. There is no treaty provision which establishes such a restriction.

The effect of paragraph 1 of Article 4—the only relevant text in this connection—is that certain qualifications therein enumerated are required for admission, and that these qualifications are essential; but there is no express and direct statement that these qualifications are sufficient and that once they are fulfilled admission must of necessity follow.

Not only does the paragraph not say this, but it does not even imply any such restriction; indeed quite the contrary is the case.

The language of Article 4—'Membership is open', '*Peuvent devenir Membres*', 'admission will be effected', '*se fait*'—is permissive in tone, not obligatory. So far as we understand, the Chinese, Russian and Spanish texts contain nothing which contradicts this view. Paragraph 1 of Article 4 enacts that States which fulfil the conditions therein enumerated possess the qualifications required for admission; this enumeration is exhaustive in the sense that no other condition is required by the Charter; this provision, which prohibits the admission of a State not fulfilling these conditions, fully carries out the intentions of the drafters of the Charter and is entitled to complete legal effect. But this provision contains no evidence of any definite intention to deprive the

Security Council or the General Assembly or their members of the legal right possessed by them of giving effect to other considerations.

Indeed, so far from depriving them of this power, Article 4 lends support to its existence.

12. This view accords with the intentions of the framers of the Charter.

Without wishing to embark upon a general examination and assessment of the value of resorting to *travaux préparatoires* in the interpretation of treaties, it must be admitted that if ever there is a case in which this practice is justified it is when those who negotiated the treaty have embodied in an interpretative resolution or some similar provision their precise intentions regarding the meaning attached by them to a particular article of the treaty. This is exactly what was done with respect to paragraph 2 of Article 4.

13. Before dealing with this point we may begin by stating that while the Minutes of the San Francisco Conference show clearly the importance attached to the qualifications for admission therein set out and also to the respective roles of the General Assembly and the Security Council in regard to admission, and while they make it clear that the above-mentioned qualifications are regarded as essential, they contain no indication of any intention to regard them as sufficient to impose upon the Organisation a legal obligation to admit the State which possesses them.

14. Without describing in detail the drafting of Article 4, we shall mention the following points:

The Dumbarton Oaks Proposals (Chapter III, Membership, and Chapter V, General Assembly) contained the two following sentences :

> ' Membership of the Organisation should be open to all peace-loving States.'
>
> ' The General Assembly should be empowered to admit new Members to the Organisation upon recommendation of the Security Council.'

(It will be remembered that these were proposals and not draft articles.)

At San Francisco, the first of these sentences was dealt with by Committee 2 of Commission I, and finally emerged as paragraph 1 of Article 4 of the Charter. The Minutes of this Committee are to be found in Volume VII of the Conference Records. On page 306 will be found the report of the Rapporteur of Committee I/2 submitting the text of paragraph 1 of Article 4 in substantially the form adopted. After dealing with the rejection of the proposal in favour of universal membership, it referred to the ' two principal

tendencies . . . manifested in the discussion', one in favour of 'inserting in the Charter specific conditions which new Members should be required to fulfil, especially in matters concerning the character and policies of governments', while the other view was that 'the Charter should not needlessly limit the Organisation in its decisions concerning requests for admission and asserted that the Organisation itself would be in a better position to judge the character of candidates for admission'.

> 'It was clearly stated that the admission of a new Member would be subject to study, but the Committee did not feel it should recommend the enumeration of the elements which were to be taken into consideration. It considered the difficulties which would arise in evaluating the political institutions of States and feared that the mention in the Charter of a study of such a nature would be a breach of the principle of non-intervention, or if preferred, of non-interference. This does not imply, however, that in passing upon the admission of a new Member, considerations of all kinds cannot be brought into account.' (Vol. VII, p. 308.)

It will be noted that this passage calls upon the Organisation, that is to say, the Security Council and the General Assembly, to conduct the most extensive investigation. No doubt it might be argued that the final sentence quoted relates solely to the investigation which the Organisation must make regarding the qualifications specified in paragraph 1 of Article 4. This interpretation is in no way self-evident; it is purely conjectural and is inconsistent with the French text of this report, which states the duty of the Organisation to be '*de se former un jugement sur l'opportunité de l'admission d'un membre nouveau*'. Judgment upon the expediency of an admission is not a mere declaration that the conditions specified in paragraph 1 of Article 4 are satisfied; it goes much further than that.

A little further on (p. 309), the same report, commenting upon the future paragraph 1 of Article 4, in a sentence the significance of which is reinforced by the fact that this sentence was substituted for an earlier and less precise text (p. 290), declares that 'the text adopted sets forth more clearly than the Dumbarton Oaks Proposals those qualifications for membership which the delegates deem fundamental, and provides a more definite guide to the General Assembly and Security Council on the admission of new members'. The statement that the qualifications required by paragraph 1 of Article 4 are considered as fundamental in no way excludes, but,

on the contrary, implies, the possibility of further requirements, upon grounds which are different and more discretionary.

The second sentence of the Dumbarton Oaks Proposals quoted above was dealt with at San Francisco by Committee 1 of Commission II (General Assembly), whose proceedings are recorded in Volume VIII of the Records of that Conference. The report of the Rapporteur of this Committee, as approved by the Committee on May 28, 1945, contains the following paragraph (VIII, p. 451) :

> 'The Committee recommends that new members be admitted by the General Assembly upon recommendation of the Security Council. (See attached Annex, Item 2.) In supporting the acceptance of this principle, several delegates emphasised that the purpose of the Charter is primarily to provide security against a repetition of the present war and that, therefore, *the Security Council should assume the initial responsibility of suggesting new participating states.*' (The italics are ours.)

Annex, Item 2, Vol. VIII (p. 456), is as follows :

> 'The General Assembly may admit new Members to the Organisation upon the recommendation of the Security Council.'

Language more discretionary, more permissive, than 'may admit', '*a le pouvoir d'admettre*', it would be difficult to find.

The Summary Report of the 15th Meeting of the same Committee, held on June 18, 1945, contains the following passage (Vol. VIII, p. 487) :

> '*Admission of New Members.*
>
> The Committee considered the following texts of Chapter V, Section B, paragraph 2, of the Dumbarton Oaks Proposals, which were under consideration by the Co-ordination Committee :
>
> "The admission of any State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."
>
> "L'admission de tout État comme membre des Nations Unies est prononcée par l'Assemblée générale sur la recommendation du Conseil de Sécurité."
>
> The Secretary reported that he had been advised by the Secretary of the Advisory Committee of Jurists that that Committee felt these texts *would not in any way weaken the original text adopted by the Committee. In the light of this interpretation the Committee approved the texts.*' (The italics are ours.)

The Second Report of the Rapporteur of Committee II/1, which

was circulated to the Members for their approval on June 19, 1945, contains the following passage (Vol. VIII, p. 495) :

> '*Admission of New Members* (Chapter V, Section B, paragraph 2, of the Dumbarton Oaks Proposals).
>
> The Committee considered a revision of the text of this paragraph which was under consideration by the Co-ordination Committee in order to determine whether the power of the Assembly to admit new Members on recommendation of the Security Council was in no way weakened by the proposed text.
>
> The Committee was advised that the new text *did not in the view of the Advisory Committee of Jurists, weaken the right of the Assembly to accept or reject* a recommendation for the admission of a new member. . . .
>
> The Committee agreed that this interpretation should be included in its minutes as the one that should be given to this provision of the Charter, and on this basis approved the text as suggested by the Co-ordination Committee.' (Italics ours.)

These passages show that the text thus worked out which ultimately became paragraph 2 of Article 4, was regarded as conferring very wide powers upon the General Assembly.

Finally, M. Delgado, the Rapporteur of Commission I, said, both in his Report to the Conference (Vol. VI, p. 248) and in his speech at the plenary session on June 25 : ' New Members will be admitted only if they are recognised as peace-loving, accept the obligations contained in the Charter, and, upon scrutiny by the Organisation, are adjudged able and ready to carry out those obligations.' (Vol. I, p. 615.)

He thus stated very clearly that the qualifications specified in paragraph 1 of Article 4 are essential qualifications. Had he considered them also as sufficient, he would not have failed to say so.

15. Nor can the significance of the word ' recommendation ', in paragraph 2 of Article 4, be overlooked. It is the function of the Security Council to reject an applicant or to recommend its admission. On the one hand, this fact indicates the discretionary nature of this function of the Security Council, while, on the other hand, the freedom of the General Assembly either to accept the recommendation and admit the applicant or to reject the application indicates that the function of the General Assembly in this matter is also discretionary.

16. So far as particularly concerns the freedom of a Member of the United Nations to put forward, in the course of the examination of an application for admission, this or that consideration foreign to the qualifications specified by paragraph 1 of Article 4,

we may add that the General Assembly and the Security Council possess, by virtue of Articles 21 and 30 of the Charter, the right to regulate their own procedure. We can find nothing else which could restrict the freedom of discussion and, consequently, subject to the general control exercised by each organ, a Member enjoys the right of expressing its views in the course of the debates.

17. In our opinion it follows from these considerations that a Member of the United Nations remains legally entitled, either in the Security Council or in the General Assembly, during the discussion upon the admission of a new Member, to put forward considerations foreign to the qualifications specified in paragraph 1 of Article 4, and, assuming these qualifications to be fulfilled, to base its vote upon such considerations.

18. In our opinion, while the Charter makes the qualifications specified in paragraph 1 of Article 4 essential, it does not make them sufficient. If it had regarded them as sufficient, it would not have failed to say so. The point was one of too great importance to be left in obscurity.

It is easy to understand why the authors of the Charter, after having rejected the principle of universality, should deem it undesirable to exclude the consideration of the very diverse political factors which the question of admission can in certain cases involve. When one considers the variety in the political conditions of the States which were not original Members of the United Nations—some ex-enemy, some ex-neutral, one permanently neutral by treaty, some with empires and some without, some unitary and some consisting of federal or other unions of States—and when one considers the political repercussions attending the union of existing States, or the emergence of new States and their entry into the United Nations—perhaps the framers of the Charter, after having decided in this connection to entrust a special mission to the Security Council, were wise in their generation in taking the view (as we submit they did) that it was impossible to do more than to prescribe certain preliminary and essential qualifications for membership and to leave the question of admission to the good faith and the good sense of the Security Council and the General Assembly, and particularly the former by reason of the special responsibilities laid upon it. For the authors of the Charter had to look beyond the year 1945 and endeavour to provide for events which the future had in store. A little reflection upon the changes in the map of the world during the short period which has elapsed since June, 1945, suggests to us that they were prescient and prudent in the plan which they adopted.

19. When a Member of the United Nations imports into the

examination of an application for admission a consideration which is foreign to the qualifications of paragraph 1 of Article 4, what he does is not the same thing as it would be if the Charter made such a consideration a qualification additional to those already required. That would involve amending the Charter, and there can be no question of that. The Member is merely introducing into the discussion, as he has a right to do, a political factor which he considers of importance and on which he is entitled to rely but which the other Members are equally entitled to consider and decide whether to accept or reject, without being legally bound to attach any weight to it; whereas on the other hand they would be legally bound to give effect to an objection based on the duly established lack of one of the qualifications specified in paragraph 1 of Article 4.

20. While the Members of the United Nations have thus the right and the duty to take into account all the political considerations which are in their opinion relevant to a decision whether or not to admit an applicant for membership or to postpone its admission, it must be remembered that there is an overriding legal obligation resting upon every Member of the United Nations to act in good faith (an obligation which moreover is enjoined by paragraph 2 of Article 2 of the Charter) and with a view to carrying out the Purposes and Principles of the United Nations, while at the same time the members of the Security Council, in whatever capacity they may be there, are participating in the action of an organ which in the discharge of its primary responsibility for the maintenance of international peace and security is acting on behalf of all the Members of the United Nations.

That does not mean the freedom thus entrusted to the Members of the United Nations is unlimited or that their discretion is arbitrary.

21. For these reasons, our view is that the first question should be answered as follows :

A member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State which possesses the qualifications specified in paragraph 1 of that Article, is participating in a political decision and is therefore legally entitled to make its consent to the admission dependent on any political considerations which seem to it to be relevant. In the exercise of this power the Member is legally bound to have regard to the principle of good faith, to give effect to the Purposes and Principles of the United Nations and to act in such a manner as not to involve any breach of the Charter.

22. Having now replied to the first question, we shall proceed to the second, which is as follows :

> 'In particular, can such a Member, while it recognises the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?'

The practice of the General Assembly and of the Security Council in regard to the admission of new Members recognises an affirmative vote, a negative vote, or an abstention, but not a vote subject to a condition; so the second question put must be understood as asking the Court to decide whether a Member of the Organisation is legally entitled, while admitting that the qualifications prescribed in Article 4, paragraph 1, are fulfilled by the applicant State, to vote against its admission unless the Member is assured that other States will be admitted to membership in the United Nations contemporaneously with that State.

This question is put in general terms, and without making any distinction according to the importance possessed by the vote of any particular Member in the attainment of the majority required in the Security Council or in the General Assembly.

23. If it is agreed (as we have already submitted) that a Member of the United Nations is legally entitled to refuse to vote in favour of admission by reason of considerations foreign to the qualifications expressly laid down in Article 4, paragraph 1, this interpretation applies equally to the second question.

A consideration based on the desire that the admission of the State should involve the contemporaneous admission of other States is clearly foreign to the process of ascertaining that the first State possesses the qualifications laid down in Article 4, paragraph 1; it is a political consideration. If a Member of the United Nations is legally entitled to make its refusal to admit depend on political considerations, that is exactly what the Member would be doing in this case.

24. If the request for an opinion involved the Court in approving or disapproving the desire thus expressed by a Member of the United Nations to procure the admission of other States at the same time as the applicant State, it would only be possible to assess this political consideration from a political point of view. But such an assessment is not within the province of the Court. An opinion on this subject would not be an opinion on a legal question within the meaning of Article 96 of the Charter and Article 65 of the Statute. It is one thing to ask the Court whether a Member is legally entitled to rely on political considerations in voting upon the admission of

new Members; that is a legal question and we have answered it. It is quite another thing to ask the Court to assess the validity of any particular political consideration upon which a Member relies; that is a political question and must not be answered.

25. Nevertheless, as we have said, a Member of the United Nations does not enjoy unlimited freedom in the choice of the political considerations that may induce it to refuse or postpone its vote in favour of the admission of a State to membership in the United Nations. It must use this power in good faith, in accordance with the Purposes and Principles of the Organisation and in such a manner as not to involve any breach of the Charter. But no concrete case has been submitted to the Court which calls into question the fulfilment of the duty to keep within these limits; so the Court need not consider what it would have to do if a concrete case of this kind were submitted to it.

(*Signed*) J. BASDEVANT.
WINIARSKI.
ARNOLD D. MCNAIR.
JOHN E. READ.

Dissenting opinions were also delivered by Judges Zoričić and Krylov.

BOOK REVIEWS

Rénovation des bases de la vie des peuples. By ALEJANDRO ALVAREZ, Member of the Institut de France, followed by statements made by Members of the Institut de France, Professors in the Faculty of Law of Paris, and Diplomats. [Paris. Editions France-Amerique. 1948. 168 pp.]

M. ALVAREZ, the distinguished Judge of the International Court of Justice, prefaces his monograph by an interesting study on the regime of social interdependence which calls forth two main observations; in the first place, its smooth functioning presupposes collaboration; at present, States too often allow themselves to be guided by egotistical views; secondly, we can now observe a dual psychological phenomenon :—the survival of an economic nationalism which is both narrow and selfish, and, opposed to it, a growing belief in internationalism and in the realisation of the future harmonious co-operation among the States in place of the strife and rivalry which now divide them. This second tendency is triumphing as clearly in America as it is in Europe. At the last American Conference held in Mexico in 1945, approval was given to an economic Charter proposed by the United States delegation which in itself constitutes a great step forward on the road to co-operation. Europe is similarly aiming towards the establishment of an economic co-operation, if not among all the States, at least among certain groups of States. We are, in fact, witnessing at present the possibility of co-operation between the main continents.

The regime of interdependence conjures up further visions : the limitation of sovereignty; the creation of public services on an international scale; the formation of international bodies, the recognition of the fact that States have not only rights but also duties in their relations with other States and with the international community as a whole.

States are born and develop. They can pass through a period of stagnation or even of retrogression—that happens above all after great wars—but very often they are also rejuvenated and become, in reality, new States. After the first World War in 1914, two ancient countries, which had for some time wallowed in a state of stagnation, became vested with new life which surged through their constitutions, organisation and essential elements. They were Russia and Turkey. And since the catastrophe through which we have just passed, India, a nation of over a thousand years' development, and now divided into two States, will, in all probability, achieve new life as an independent Dominion within

the British Commonwealth of Nations. Then perhaps China, another extremely ancient Asiatic State, will soon rediscover its greatness. Even Germany, a modern State which has been completely revolutionised by the last war, could be reborn, particularly in the intellectual and cultural sense, and could then play a very important role in the social life of the world. All of which indicates that States could form centres of culture as well as regional continents.

The decadence of western civilisation has been deplored often and long enough, and after the last world cataclysm it was claimed that the downfall of Europe was being witnessed. But this is not the case. In this respect, M. Alvarez is optimistic; he believes that Europe, after the present period of apparent ruin caused by economic upheavals, and the devastation and suffering of war, can and must be reborn for the greater good of mankind. Once again, Europe is faced with the prospect of modelling itself on America and, particularly, on the organisation of that country and on the spirit of Pan-Americanism; but the feature which it must above all strive to imitate is the predominance of social over anti-social sentiments, a predominance without which a similar organisation could not be effectively established. Similarly, from the intellectual point of view, Europe must rid itself of prejudices and ancient conceptions and must bring about a revolution in that sphere which will have repercussions in other continents for the greater benefit of humanity. It will fall to the rising generation to undertake this social and intellectual renewal, for, after the two great cataclysms of which they have been the victims, it is too much to hope that the present generation will be equal to the task.

A new conception of democracy must make its appearance. It cannot afford to be purely political; it must also have an economic and social character; nay, it must even be international. This will be attained if the theory of social interdependence is generally accepted as a fundamental principle. Only then will the new conception aspire to become the one form of government suitable to the widely differing countries of every continent. The conception of the role of the individual in international life must evolve as a part of this principle that all rights spring from the organised society. The formation of the declaration of the individual rights of man should be such as to present a positive character; that is to say, it must not have as its basis a philosophy inspired by personal considerations; nor must it lay undue emphasis on the rights of minorities or the rights of the individual to migrate without restriction, but it must enforce practical sanctions indicated by a special commission established by UNO for that purpose or laid down by the International Court of Justice. While recommending the project adopted on his motion

in November, 1945, at the inter-American Conference of Lawyers held at Santiago, the author criticises the draft declaration drawn up by the Commission of UNO at Geneva.

Finally, we are faced with the international community which is, in fact, tending to transform itself into a veritable international society. Today the sovereignty of the State is no longer inviolable as it was under the individualistic regime : it must perforce form part of an international society which limits its sovereignty. The rights of man are intimately bound up with its political character. There are, in addition, narrow dividing lines between the juridical and the political systems. This must be emphasised because, by reason of the complexity and variability of international relations, there are no international questions which can be classed as being entirely juridical. The same question changes its character in accordance with changes in current events. For example, forty years ago, the question of American territory in the Antarctic awoke only a juridical interest, which moreover, was limited to the whaling industry. Today, it raises a question of a sixth continent containing enormous wealth of capital importance, notably in the field of atomic energy, which affects world-wide lines of communication; which dominates the security of the entire American continent and which indeed, in the last resort, imperils American solidarity. From all this it follows that a judgment delivered thirty years ago on a specific question and deemed excellent at that time would, under the same conditions today, be wholly unacceptable. The criterion of interpretation of political policy is wider than that of the law. In the interpretation of a treaty on international organisation, it is necessary to take into account, not only the precedents or discussions on the subject, but also the nature of the institution in question which, once created, acquires a life of its own and must develop in conformity with social necessities; and this is often contrary to the premature expectations of the drafters of the text.

M. Alvarez's monograph ends with a general discussion on the main principles advocated by him (pp. 121 to 160). M. Gabriel-Louis Jaray, the President of the Commission of the Comité France-Amerique, evoked memories of the international societies of the twelfth and thirteenth centuries. He said that there were certain dominating ideas which right up to this day have ruled both European and American civilisations. Three quotations, two from the statements made by the U.S. Secretary of State, Mr. Marshall, on March 11 and August 20, 1947, and the third by Pius XII on October 20, 1939, enabled him to maintain that there are two doctrines : one individualistic and liberal, and the other absolute; one of which elevated the individual above the State while the other placed the State above the individual. M. Alvarez,

by choice, establishes a third doctrine, which while denying the omniscience of natural rights, demands that the State should recognise the rights of the individual and that the individual should recognise the rights of the State. M. Basdevant queried whether M. Alvarez did not sometimes give a rather arbitrary interpretation to historical facts, particularly when he was considering ancient conditions and ideals. M. Caballero de Bedoya (formerly Minister for Paraguay) and M. Zerega Fombona (former Minister for Venezuela) specified that in Latin America the rights of man existed only on paper. In conclusion, Professor de La Pradelle contended that, in the light of historical developments, his conception of the State was not a natural creation, and consequently could not be linked with the law of nature, but was a creation of man in his attempt to seek protection by forming a community based on international law, the jurisdiction of which was determined by its aim, which is 'the common good'; in other words, the development of rights which are 'essential to the human being'.

C. JOHN COLOMBOS.

The Great Assize—An Examination of the Law of the Nuremberg Trials. By J. H. MORGAN, K.C., with Preface by the Right Hon. Viscount Maugham. [John Murray. 1948. Paper. Prelim., ix and 44 pp. 2s.]

Crimes against Peace. By FRANZ B. SCHICK. [Reprinted from Journal of Criminal Law and Criminology of North-Western University, January-February, 1948. Paper. 20 pp. No price stated.]

La Définition du Crime Contre L'Humanité. By A. BOISSARIE. In Revue Internationale de Droit Pénal, 1947, Nos. 3–4. [Paris. Recueil Sirey. 330 frs.]

Le Procès de Nuremberg et L'Avenir de la Justice Pénale Internationale. By M. CALOYANNI. [Reprinted from La Revue de Droit International, No. 4/1946. Geneva. Paper. 8 pp. No price stated.]

State and Law. Special number on International Crimes. (In English.) [Published by Democratic Lawyers' Association, Poland. Editor, Dr. Ehrlich, Lodz. Paper. 15 pp. Subscription rate : six months £1.]

De Grotius à Nuremberg : Quelques Réflexions. By Professor J. C. Witenberg. [Reprinted from La Revue Générale de Droit International Public, 1947. Éditions Pedone, Paris. Paper. 24 pp. No price stated.]

The public has grown so weary of great historical events that the sombre drama of the Nuremberg trials fell rather flat. But here, if ever, was an example of the international law-enforcement which had been called for by numberless resolutions throughout the twenties and thirties. Was the enforcement valid? Is aggressive war a crime? Are there such things as 'Crimes against Humanity'? Who shall decide, when the learned disagree with a wealth of technical arguments whose only disadvantage is that they tend to cancel each other out? Here, for instance, are six interesting short studies; the first two critical of the law applied at Nuremberg, and the other four seeing no objection to it. The last, by Professor Witenberg, ranges beyond the trial, and examines international law as it stood after the shock of the second World War, reaching the conclusion that the differing conceptions of life held by Russia and the West will not prevent common action to strengthen and improve law. This was written in 1946, but it may well be that subsequent events have left Professor Witenberg's opinion unchanged, based principally, as it is, on Soviet participation in the United Nations Organisation, the International Court, and, above all, in the Nuremberg trial. The author expresses no doubt about the validity of the indictments, or the law, and in this his view is shared by M. Boissarie and Judge Caloyanni. The Polish publication, *State and Law*, contains collected material in favour of the trial, including a note by Lord Wright referring to the responsibility of individuals for crimes against international law, in which he remarks that 'it is with some surprise that one observes the reluctance of some professed international lawyers to admit these principles'.

On the other hand, Professor Morgan directs formidable batteries against the indictments for conspiracy, crimes against humanity, and crimes against peace. He regards these charges as entirely unfounded in international law, but does not question them 'so far as Germany and German law are concerned'. This raises important problems, which can only be briefly and inadequately discussed in a review. Writing with characteristic brilliance, Professor Morgan spares no one, from the late Professor Oppenheim to the War Crimes Commission. He stigmatises the indictment for crimes against humanity as an 'extraordinary count', though this, it will be remembered, included murders on a scale unknown in the Dark Ages, and it would have been strange if international law had been powerless to deal with them. Whether it was as powerless as suggested seems, however, to depend on the

answer to the points raised by Dr. Schwelb in his elaborate study in the 1946 *British Year Book of International Law*, to which Professor Morgan does not refer. It may also be noted that he cites Article 6 (c) of the Charter without commenting on the Protocol of October 6, 1945, and some may doubt whether he lays adequate stress on the important limitation of 'Crimes against Humanity' dealt with at pages 64 and 65 of the judgment. Professor Morgan also has no hesitation in condemning, root and branch, the decision that aggressive war is a crime; this part of the judgment, he says, 'contained no law at all'. His reasons are interesting and are expressed with great vigour, but here again there are those who will doubt whether he has fully met the prosecution case. To instance only one of many controversial points, he spares no words in condemnation of the Briand-Kellogg Pact, but to some it will remain open to question whether he refutes the view that the Pact brought about a fundamental change. It is claimed that wars of aggression, previously excused by a dubious legality which cloaked the crimes committed in their course, thereupon became totally illegal. Hence the contention that the starting of the war, and also the violent acts committed by the aggressor, lost their previous immunity and were indictable as crimes. This was elaborated several times during the trial, and particularly by the French prosecutor (Transcript, Vol. 4, pp. 350 and 351) and it seems perfectly tenable. Why should it be a crime to shoot a man in peace time and not a crime to start a war which kills millions? This question is not so easily disposed of as some would think and it is not altogether clear that Professor Morgan's reference to views held in pre-Kellogg Pact days is of much assistance.

Professor Schick's analysis of the charges merits far more space than can be given in this review, but here also it might perhaps be questioned whether he makes sufficient allowance for the radical alteration which, as the prosecution (and others) claim, was effected by the Pact; it is not only 'according to popular notions' that the Pact 'prohibits war as an instrument of national policy without qualification'. Some may also be inclined to doubt whether The Hague Convention of 1907 was 'implemented by means of national legislation'. Neither the British Manual of Military Law nor the United States Basic Field Manual are legislative instruments; they were published for informative purposes only.

As said already, M. Boissarie, Judge Caloyanni and Professor Witenberg do not appear to share the difficulties felt by Professor Morgan and Professor Schick, and it is clear that they regard the trial as a substantial gain for international justice and law-enforcement. The controversy will continue, and it may be doubted whether either side will convince the other.

HECTOR A. MUNRO.

The Alien and the Asiatic in American Law. By M. R. Konvitz. [New York : Cornell University Press. London : Geoffrey Cumberledge. 1947. 299 pp. 18s.]

According to Article 1 (3) of the Charter, one of the purposes of the United Nations is to promote and encourage ' respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion '. Further, by Article 10 (2) of the United Nations *Draft International Declaration on Human Rights*, individuals are to have the right to ' acquire the nationality of any country willing to grant it ', while, for those who are not nationals, the *Draft International Covenant on Human Rights* provides, in Article 12, that ' no alien legally admitted to the territory of a State shall be arbitrarily expelled therefrom '. On the face of them, there is nothing incompatible between any of these assertions; but one is left with a different impression after reading *The Alien and the Asiatic in American Law*, in which Professor Konvitz considers how far the Constitution of the United States of America and its First, Fifth and Fourteenth Amendments, lend protection to aliens and Asiatics where fundamental freedoms and human rights are concerned.

The recently published report of a Presidential Committee entitled *Defend These Human Rights* and the text of the proposed bill to make lynching a federal offence have reminded us, if any reminder were needed, that there is discrimination in the United States against the negro. Professor Konvitz, however, is interested in the problem of the alien and the Asiatic only, and excludes all discussion on the negro question, for persons of African descent may become citizens while other coloured persons cannot, although since 1943, Chinese have been given this right, and since 1946, the right has been extended to a limited number of Indians.

The researches of Professor Konvitz have led him to the conclusion that American legislation deprives aliens of fundamental human rights (pp. 168–9). So much is this so, that in 1944, the American Commissioner of Immigration and Naturalisation made a statement to the effect that the only country in the world, outside of the United States, that observes racial discrimination in matters relating to naturalisation was Nazi Germany, ' and all will agree that this is not very desirable company ' (pp. 80–1).

Article 9 of the American draft *Proposal for a Declaration of Human Rights* submitted to the United Nations Commission on Human Rights provided that ' everyone has the right . . . to work. . . . There shall be equal opportunity for all to participate in the economic and cultural life of the community '. In Chapter 6 of *The Alien and the Asiatic in American Law*, Professor Konvitz shows that this is far from being true in the United States. Thus in no State in the Union can an alien practice as an attorney; in fourteen, no alien physician may practice; and in four, even

registered nurses must be citizens. In five States, only citizens can be barbers; in four, billiard or pool room attendants must be citizens; and in eleven, only citizens may teach. In addition, the law of twenty-six States provides that only citizenship or a declaration of intention will entitle a person to receive an old age pension, and in seven the only blind persons who can receive public assistance are citizens.

Aliens are not even entitled to equal protection of the law, for the courts have held that deportation is not a legal process and no one, not even an American citizen of Chinese origin, is entitled to a writ of *habeas corpus*, while the rules against *ex post facto* law do not apply to deportation or denaturalisation proceedings, so that an alien may be deported, or a naturalised American lose his citizenship, for having done something that was quite legal at the time of commission, but was rendered illegal by a subsequent legislative measure (p. 56).

Even when a treaty with a foreign power has granted equal rights to aliens or Asiatics, and national legislation does not seem to conform to the treaty requirements, the Supreme Court has pointed out, in considering the constitutional nature of such legislation, that although treaties to which the United States is a party are part of the law of the land, they are equal to, and not superior to, legislation, and it is the last expression of the sovereign will that prevails and is authoritative (p. 22). This fact may well cause cynics to question the value of any Declaration or Covenant of Human Rights to which the United States, or any State with similar constitutional regulations, is a party.

Perhaps the most usual criticism levelled at the various draft Covenants of Human Rights is that the exception clause they contain is so wide that it removes any inherent value from the Covenant. In reply to this criticism it has been pointed out that the United Nations Draft Covenant, for example, specifically provides that any party to the Covenant derogating from it in any way must report this derogation, and the reasons therefor, to the Secretary-General, who must also be informed when the situation improves. In the light of this it has been suggested that the General Assembly may, if it considers that the State in question is taking undue advantage of the clause, call upon it to explain why the situation has not improved. This 'right' of the General Assembly may be compared to the power of the United States Supreme Court to declare any administrative measure or Act of Congress, Federal or State, unconstitutional. It may, therefore, be apposite to quote what Professor Konvitz has to say about the functions of the Supreme Court: 'To sustain a measure, the Court need not be convinced that it was necessary, the Court need not approve it—the Court need only find that the authorities had some ground for thinking the measures necessary.' (p. 260)

L. C. GREEN.

A Concise History of the Law of Nations. By Arthur Nussbaum. [New York: The Macmillan Company. 1947. 362 pp. 22s. 6d.]

At a time when a greater proportion than ever before of human beings throughout the world is consciously desiring the stability and security that effective universal law could provide, this admirable book by the well-known research Professor of Public Law at Columbia University renders a great service. What is the Law of Nations? This is the question the author sets out to answer in the light of history. If, on the one hand, his researches provide a complete answer to those who suggest that the Law of Nations does not exist, there is left, on the other, little room for satisfaction with its achievements. For example, the nineteenth century witnessed a tremendous progress in multilateral treaties, 'probably the foremost vehicles of advance' in international law, yet 'very many of them are ineffectual because of the paucity or insignificance of their signatories or for other reasons'.[1] The author finds, in fact, 'an unusual amount of futility and mere "show" in international legal activities' in this period. This assessment of the more immediate past is slender encouragement to those who would found future development upon it, but, in the wider sense, as the author suggests, the lessons of history are not conclusive.

What, then, is the 'Law of Nations'? Near to philosophy, to political science, in earlier times to religion, near also to what might be called the behaviour of human societies in relation to each other on a world plane, the Law of Nations stands out from the pages of this book as norm making law, impinging on or overlapping all of these, yet all the time a thing by itself. It is real.

But though real, it lacks the power to control, at least in sufficient measure to be a primary promoter of stability in the modern world. Yet it is stronger than it was. In the nineteenth century, for example, it became consciously organisational, and organisation is in some degree stability. Can it become stronger than that, and in the immediate future? The author leaves to each reader his or her own prognosis. Does the extraordinary material contraction of the modern world that we are witnessing by itself import a world society of man, as some jurists are arguing? Or does it augur such a society in the future, in which an effective, controlling Law of Nations may flourish? Will mankind be drawn into a new world order, almost in spite of itself, by the contracting power of the material forces it has itself unleashed, or will men take control and order both their affairs and the material forces at their disposal? If the latter,

[1] Page 3.

then it would seem that the future Law of Nations would need to be expressly created rather than be allowed to remain derivatory as it has been in the past. Shades of Austin.

J.

Het Rechtsmisbruik in het Volkenrecht. Rechtstheoretische Verhandeling, door E. R. C. VAN BOGAERT, Rechter in de Rechtbank van eerste aanleg te Gent. [De Sikkel. Lamorinierstraat 116, Antwerpen. 1948. 121 pp. 120 fr.]

THIS is one of a series of studies published by the *Rechtskundig Weekblad*. The author is a judge in the Court of first instance in Ghent. Contrary to what the title might seem to suggest (*abus de droit* in international law) but, as the subtitle indicates (a study in legal theory), the author's chief interest is not primarily in *abus de droit* or in international law, but in the General Theory of Law, or, as we in England call it, Jurisprudence. His concern is to show the necessary relation of Jurisprudence to the practical problems which confront the lawyer. To put his theory to the severest possible test, he takes for his subject one of the vaguest of legal conceptions—*abus de droit*—and pursues it in the most unsettled branch of law—international law. How does the author set to work? First, he inquires what writers on international law have to say about it; but the inquiry yields poor results. Next, he makes a comparative study of Roman Law, modern codes and 'Anglo-Saxon' law. Again the results are disappointing. These systems generally agree in condemning *abus de droit*, but the question what *abus de droit* is *per se*, remains undecided. The author then concentrates his attention on French and Belgian Law. The French Code and the Belgian Code (the French Code transplanted) have nothing to say on the subject; which, therefore, is to be found, if anywhere, as in fact it is, in the 'Doctrine' and the 'Jurisprudence' (in the Continental sense) for which the Flemish equivalents are *Rechtsleer* and *Rechtspraak*. Once more the results are disappointing. The *Rechtsleer* is fluctuating, varying with the fashion of the time—Roman-traditional, individualistic, socialistic, etc.—and the *Rechtspraak* has concentrated upon three particular topics, *viz.*, the right of ownership, the right of action, freedom of the press, with the limits to be set to each. Again, there is no general theory and no general practice. So at last our author *nans in gurgite vasto*—comes to land on the impregnable rock (if so it be) of Analytical Jurisprudence. Borrowing from the sociologists and indeed from Ihering, the idea of *Zweck im Recht*, he proclaims the principle that every right has its scope, its cause, its reason for being (*bestaansoorzaak*), which defines the limit of its legitimate application. Whatever exceeds this limit is *abus de droit*. It

remains to apply this principle to a number of selected topics in international law, and this the author does in the second half of his book. It is a brave enterprise. One must sympathise with his disappointment with the result. A general view of the subject, he says, 'inclines to an undeniable pessimism'. There is too much 'relativity' about it to admit of the formulation of any general principle of law, defining the point at which the exercise of a right becomes a wrong, in other words the point at which the particular right ceases to exist.

In conclusion, a few general remarks. The author's reading is extensive. The Bibliography includes some 250 items. The treatment of English law is not up to date. The only textbook cited is Pollock's *Law of Torts*, 1920. The Vexatious Actions Act (cited as the Vexation Act), 1896, has been replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51. P. 63, l. 3, delete 'not'. There are many misprints in Latin words. Judge van Bogaert's book is a conscientious and valuable study of a difficult question.

R. W. Lee.

Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission. English edition. [London: published for the United Nations War Crimes Commission by H.M. Stationery Office. 1947: Vol. I, 128 pp., 2s. 6d.; Vol. II (The Belsen Trial), 158 pp., 3s. 1948: Vol. III, 126 pp., 5s.]

One of the aims of this series is to relate in summary form the most important of the proceedings taken against persons accused of committing war crimes during the second World War, apart from the major war criminals who have been tried or are being tried by the International Military Tribunal at Nuremberg and by the International Military Tribunal for the Far East at Tokyo, but including those at present being tried by United States Military Tribunals at Nuremberg. By necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied courts now number well over a thousand. The trials selected for reporting are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed 'Notes on the Case', such comments of an explanatory nature on the legal matters arising in that trial which it has been thought useful to include. These notes provide also, at suitable points, summaries and analyses of the decisions of the

courts on specific points of law derived primarily from a study of trials already reported upon in this series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure of the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held. Finally, each volume includes a Foreword by Lord Wright, Chairman of the United Nations War Crimes Commission.

The offences involved in the trials reported upon in Vol. 3 were abuse of legal process in occupied territories, the killing and ill-treatment of civilians and prisoners of war, deportation of civilians and unlawful recruitment by an occupying Power. The defences put forward by various accused and considered by the courts which tried them included the familiar pleas of superior orders and challenges to the jurisdiction of the court together with less common arguments based on drunkenness, self-defence, allegedly legitimate reprisals, provocation, military necessity and the claim that a civilian victim lost his civilian status. Numerous other legal problems arose incidentally and were settled by the courts. Several of the trials reported, as, for instance, the trial of Robert Wagner before a French Tribunal, illustrate again the fact that civilians may be guilty of war crimes equally with members of the armed forces.

It is intended that the volumes contained in this series should be internationally representative. Thus, Vol. 3 includes reports on the trials held before British, United States, French and Norwegian courts. The first of the two Norwegian trials involved a point of high importance in Norwegian constitutional law, namely, whether the provisions of the Norwegian War Crimes Decree of 1946 violated Article 97 of the Norwegian Constitution, which prohibited the retroactive operation of laws. Similarly, the French trial which concerned, as already stated, the actions of Robert Wagner, Gauleiter of Alsace during the German occupation, settled, *inter alia*, the important question of the legal status of Alsace at that time. A study of the French and Norwegian trials will reveal some of the legal implications of the prevalent Continental legal approach to war crimes, in accordance with which the courts require proof, not merely of a violation of the laws and usages of war, but of a breach of some provision of municipal law which was not at the same time justified by these laws and usages.

The British trials reported in the same volume include an interesting total from the Far East. In addition, the British and American decisions contain several points of procedure and evidence which illustrate the degree of fairness to the accused achieved in the trials of war criminals by the Allied courts and, at the same time, the efforts that were made to ensure that no guilty person should escape justice by exploiting mere technicalities.

Volume 3 contains three annexes, dealing with the war crimes laws of Norway, France and the United States. The British Annex which was published in Vol. 1 has not been reprinted in this volume since the applicable law has not changed in the meantime, but the United States Annex which also appeared in the first volume, has been brought up to date, chiefly by the inclusion of an analysis of the Allied Control Council Law No. 10, in so far as it relates to trials held before United States Military Tribunals in Nuremberg (the 'Subsequent Proceedings') and of Ordinance No. 7 of the Military Government of the United States Zone of Germany, under which such tribunals were set up.

J.

Tratado de Direito Diplomático. By Rubens Ferreira de Mello. [Rio de Janeiro: Ministerio das Relaçoes Exteriores, Serviço de Publicaçoes. Two vols. 458 and 357 pp.]

The first volume deals with the organs of diplomatic relations; requirements of diplomatic action; diplomatic action; protocol and ceremonial; and the second volume with the aspects of diplomatic activity, diplomatic formularies, an appendix containing some official documents mentioned in the book, a bibliography and an excellent analytical index.

En diplomatie, il ne suffit pas d'avoir raison, il s'agit de plaire. These words of Paul Cambon, and other eminent diplomats which the author quotes so frequently and opportunely in order to provide greater authority for his fine conception of the complex and difficult art of diplomacy, constitute valuable embellishments to an admirable book distinguished chiefly for its own merits of complete information and faultless exposition of practical and personal experiences.

Our acquaintance with the brilliant author of this work dates from the time when he began his career in the diplomatic service of Brazil, when he modestly aimed 'to plant a tree, to have a son and to write a book'. He has written several treatises since the well-known 'O Embaixador Facúndes' and in each is portrayed the studious, highly cultured man of letters, whose optimism and faith that our civilisation will one day reach the 'Kingdom of Right', have not been affected by years spent in a materialist and weary world.

His new book is the confirmation of this faith, and is more than a handbook of reference. It should find its place in the library of every diplomat by reason of the excellent data it provides; it is a harmonious source of knowledge covering modern practices in international relations which, without omitting to refer to the cases —unfortunately only too numerous—of disregard for diplomatic law, leaves one nevertheless with the impression that diplomatic

procedure, although often contradictory and reactionary, and frequently inspired by a narrow nationalist policy, has finally arrived at the establishment of a universal 'diplomatic law', the non-observance of which carries in itself at least the sanction of international opinion.

In this connection, the decisive influence that the South American countries have exerted in modern diplomacy can once more be emphasised, and among these, Argentina, Brazil and Chile deserve to be specially mentioned as they have succeeded in strengthening and developing in the American continent a feeling of respect for international law as the fundamental basis for the maintenance of peace and prosperity.

The 'Tratado de Direito Diplomático' by Senor de Mello is, among other American works, a worthy complement of 'El Derecho Internacional Público Antes de la Era Christiana', published in 1946 by the Argentinian professor Isidoro Ruiz Moreno, and of the 'Reconstruction and Codification of International Law', by the well-known Chilean internationalist Alejandro Alvarez; the latter has already been reviewed in No. 4, Vol. 1 of the *International Law Quarterly*.

Doctor de Mello has for more than thirty years, and without interruption, served in the Brazilian Ministry of Foreign Affairs, and has also been Brazilian diplomatic representative in many countries. For several years he was Chief of Protocol, and he now holds the important post of Chief of the Economic and Consular Department at the Ministry of Foreign Affairs at Rio de Janeiro.

Humberto Videla.

ERRATUM

Mr. L. C. Green desires to state that the last paragraph in his review of Professor Ross's *A Textbook of International Law* (*supra*, p. 275) should read as follows: 'In the light of the author's philosophical writing, one cannot but feel that his comment about Knubben on sovereignty applies equally to his own book: "The rest of us . . . permit ourselves to doubt disrespectfully, like the child in 'The Emperor's New Clothes', whether there is anything but quite ordinary nonsense behind all this solemnity" (p. 34, n. 1)'.

SELECTED OFFICIAL DOCUMENTS

The following documents are printed in this issue :

1. In accordance with the provisions of the Peace Treaties with Italy, Bulgaria, Finland, Hungary and Roumania, the United Kingdom has taken steps to continue in force or to revive certain bilateral treaties which were in force between the United Kingdom and each of these countries before the second World War. The Note sent to the Italian Government is printed in full as an example and, for the rest, the notes which follow similar lines are omitted and only the lists of treaties are reproduced.
2. In various numbers of the *International Law Quarterly* there have been printed agreements of friendship and mutual assistance between the Western Powers. In the present number there is printed the Treaty of Friendship and Mutual Assistance between the U.S.S.R. and Bulgaria, which is a typical example of the series of treaties which the U.S.S.R. has made with its neighbours in Eastern Europe. It will be noted that, as in the case of the treaties between the Western Powers, respect is paid to the Charter of the United Nations.
3. The treaty between the United Kingdom and Burma regarding the recognition of Burmese independence is a document which may prove of historical interest.
4. The agreement between the United Kingdom and Poland concerning British interests affected by the Polish Nationalisation Law represents an attempt, which is almost unique, to provide for compensation for nationalisation of foreign property by the enunciation of a series of principles and by the provision of international machinery to facilitate the operation of these principles. The agreement is the result of hard bargaining between the conflicting claims of compensation for property rights and the requirements of local law, and an economy impoverished by the ravages of war.

1

REVIVAL OF PRE-WAR TREATIES AND AGREEMENTS BETWEEN HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENTS OF BULGARIA, FINLAND, HUNGARY, ITALY AND ROUMANIA.

Sofia, *March* 13, 1948
Helsinki, *March* 12, 1948
Budapest, *March* 12, 1948
Rome, *March* 13, 1948
Bucharest, *March* 13, 1948

ITALY

His Majesty's Ambassador at Rome to the Italian Minister for Foreign Affairs

Your Excellency, *March* 13, 1948.

UNDER instructions from His Majesty's Principal Secretary of State for Foreign Affairs, I have the honour to invite your Excellency's attention to the provisions of Article 44 of the Treaty of Peace with Italy and to notify you that His Majesty's Government in the United Kingdom desire to keep in force or revive the following pre-war bilateral treaties and agreements in respect of the United Kingdom of Great Britain and Northern Ireland and of those other territories for which His Majesty's Government in the United Kingdom are internationally responsible, and to which the under-mentioned bilateral treaties and agreements respectively applied at the time of the outbreak of war :—

1. Rome ..	5.ii.1873	Treaty—Extradition.
2. Rome ..	7.v.1873	Declaration—Rectifying error in above.
3. London ..	17.iv.1877	Declaration—Estates of deceased seamen.
4. London ..	8.vi.1880	Agreement—Relief of distressed seamen.
5. Rome ..	11.vii.1896	Convention—Parcel Post (as regards Malta only).
6. Rome ..	18/20.ix.1904	Exchange of Notes—Coasting Trade.
7. Rome ..	27.xi.1911	Notes extending Extradition Treaty of 1873 to African British Protectorates.
8. Rome ..	11.v.1922	Convention—War Graves.
9. London ..	29.x.1925	Agreement—Money Orders.
Rome ..	20.xii.1925	
10. Rome ..	25.i.1929	Exchange of Notes—Passenger Ship Certificates and Emigrant Ship Regulations. Mutual recognition.
11. London ..	21.viii.1930	Agreement—Parcel Post.
Rome ..	28.viii.1930	
12. London ..	17.xii.1930	Convention—Legal Proceedings in Civil and Commercial matters.
13. Rome ..	17.ix.1934	Exchange of Notes—Certificates of Airworthiness: Reciprocal Validation.

Italy—*continued.*			
14. Rome	..	6.viii.1936	Exchange of Notes—War Graves. Interpretation of Article 7 of Agreement of 11.v.1922.
15. Rome	..	21.iii.1938 3.v.	Agreement—Diplomatic Bags.
16. Rome	..	21.iii.1940	Agreement—Trade in Medicinal Products.

It is His Majesty's Government's understanding that the notification of the above list under the terms of the Treaty of Peace in no way prejudices the right of either of the two Governments to propose revisions in any of the treaties or agreements mentioned in the above list. It is also understood that any of the provisions in the treaties and other agreements in the above list which may be found not to be in conformity with the Treaty of Peace shall be considered to have been deleted in so far as the application of the Treaty of Peace is concerned, but shall be regarded as being in full force with regard to matters not covered by the Treaty of Peace.

In accordance with paragraph 2 of Article 44 of the Treaty of Peace, His Majesty's Government will register with the Secretariat of United Nations the bilateral treaties and other agreements which are kept in force or revived.

In the absence of separate representation for Ceylon, I have been instructed, at the instance of His Majesty's Government in Ceylon, to notify their desire to bring into force or revive those above-mentioned treaties and agreements which applied to Ceylon at the outbreak of war; and that the Government of Ceylon wish to reserve the right to open negotiations to alter or revoke any of these treaties or agreements, since they were signed prior to the attainment of independence by Ceylon.

I avail, etc.

(Sd.) V. A. L. MALLET.

Bulgaria

Agreement for the exchange of Money Orders signed in London on May 7, 1925, and in Sofia on June 7, 1925.

Finland

1. Helsinki	..	14.xii.1923	Agreement	Disposal of Estates of Deceased Seamen.
2. Helsinki	..	14.xii.1923	Treaty	Commerce and Navigation.
3. London	..	30.v.1924	Treaty	Extradition.
4. Helsinki	..	21.vi.1924	Agreement and Notes	Reciprocal Recognition of Tonnage Measurement Certificates
5. Helsinki London	.. ..	20.x.1924 13.xii.1924	Agreement	Exchange of Money Orders.
6. London	..	18.xi.1925	Agreement	Reciprocal Exemption from Income Tax of Shipping Business Profits.

FINLAND—*continued.*

7. London ..	11.viii.1933	Convention	Legal Proceedings in Civil and Commercial Matters.
8. London ..	13.x.1933	Convention and Declaration	Suppression of illicit importation of alcoholic liquors into Finland.
9. London .. Helsinki ..	17.x.1933 / 4.xi.1933	Agreement and Regulations	Parcel Post.
10. London ..	21.ii.1935	Agreement	Exemption from Income Tax on Profits or Gains arising through an Agency.
11. Helsinki ..	3.v.1935	Agreement	Reciprocal Recognition of Load-Line Certificates.
12. London ..	12.iii.1936	Exchange of Notes	Suppression of illicit importation of alcoholic liquors into Finland — Interpretation of Article of Convention of 13.x.1933.

HUNGARY

1. Budapest	24/30.x.1921	Exchange of Notes	Notification of Revival of certain Bilateral Treaties.
2. London .. Budapest	9.xii.1925 / 28.xii.1925	Agreement	Money Orders.
3. London ..	23.vii.1926	Treaty	Commerce and Navigation.
4. Budapest	8.xii.1927	Exchange of Notes	Extension to Palestine, etc., of Extradition Treaty of 1873 as amended in 1901.
5. Budapest	25.iv.1928		
6. London .. Budapest	11.v.1932 / 10.vi.1932	Agreement	Parcel Post, Replacement of Agreement of 1806.
7. Budapest	25.v.1934 16.vii.1934	Exchange of Notes	Extension to Malay States of Extradition Treaty of 1873 as amended by Declaration of 1901.
8. Budapest	25.ix.1935	Convention and Note	Legal Proceedings in Civil and Commercial Matters.
9. Budapest	18.ix.1936	Treaty	Extradition. Supplementary to Treaty of 3.xii.1873.
10. Budapest	22.iii.1937	Convention	Air Navigation.
11. Budapest	17.xi.1937 5.x.1938	Exchange of Notes	Extension to Zanzibar, etc., of Extradition Treaty of 1873 as amended by Declaration of 1901 and Supplementary Convention of 1936.

ROUMANIA

1. London ..	1.iv.1893	Convention	False indication of Origin on Goods.
2. Bucharest	21.iii.1893	Treaty and Protocol	Extradition.
3. Bucharest	13.iii.1894	Protocol	Regarding Article II of Extradition Treaty of 21.iii.1893.
4. Bucharest	12.i.1929	Exchange of Notes	Application to Mandated Territories of Extradition Treaty of 1893.
5. London .. Bucharest	17.iii.1930 / 2.iv.1930	Agreement	Money Orders.
6. London ..	6.viii.1930	Treaty	Commerce and Navigation.
7. Bucharest	25.ix.1933	Exchange of Notes	Reciprocal Waiver of Consular fees on Certificates of Origin.
8. Bucharest	24.v.1934 / 22.x.1934	Exchange of Notes	Extension to Malay States of Extradition Treaty of 1893.

Roumania—*continued.*

9. Bucharest	13.ii.1937 } 29.vii.1937 }	Exchange of Notes	Extension to Zanzibar and Solomon Islands of Extradition Treaty of 1893.
10. London ..	6.xii.1937	Exchange of Notes	Reciprocal Recognition of Seamen's Discharge Books in lieu of Passports.

2

[*Copy*]

TREATY OF FRIENDSHIP AND MUTUAL ASSISTANCE BETWEEN THE U.S.S.R. AND THE BULGARIAN PEOPLE'S REPUBLIC

The Presidium of the Supreme Soviet of the U.S.S.R. and the Presidium of the Grand National Assembly of the Bulgarian People's Republic, for the purpose of further developing and consolidating friendly relations between the U.S.S.R. and Bulgaria, convinced that the consolidation of friendship between the Soviet Union and Bulgaria meets vital interests of the peoples of both States and will best contribute to their economic development filled with the desire to co-operate in the interests of universal peace and security in conformity with the aims and principles of the United Nations—have decided to conclude the present Treaty for this purpose and have appointed as their plenipotentiary representatives the Presidium of the Supreme Soviet of the U.S.S.R., Vyacheslav Molotov, Vice-Chairman of the Council of Ministers and Foreign Minister of the U.S.S.R.; the Presidium of the Bulgarian People's Republic, Georgi Dimitroff, Chairman of the Council of Ministers of the Bulgarian People's Republic, who, upon exchange of their credentials found in due form and full order, agreed upon the following:—

Article 1

The high contracting parties undertake to take jointly all measures within their power to eliminate any threat of a resumption of aggression on the part of Germany or of any other State which would unite with Germany directly or in any other form. The high contracting parties declare their intention to participate in a spirit of most sincere co-operation in all international actions aimed at ensuring peace and security, and will fully make their contribution to the realisation of these lofty tasks.

Article 2

In the event of one of the high contracting parties being involved in hostilities with Germany which would try to resume her aggressive policy, or with any other State which would directly or in any other form unite with Germany in a policy of aggression, the other high

contracting party will immediately render military and every other assistance with all means at its disposal to the contracting party involved in hostilities. The implementation of the present Treaty will conform to the principles of the United Nations Charter.

ARTICLE 3

Each of the high contracting parties undertakes not to conclude any alliance and not to take part in any coalition or actions or measures directed against the other high contracting party.

ARTICLE 4

The high contracting parties will consult with each other on all important international problems involving the interests of both countries.

ARTICLE 5

The high contracting parties declare that they will develop and consolidate economic and cultural connections between the two States in a spirit of friendship and co-operation, adhering to the principles of mutual respect for their independence and sovereignty and non-interference in the internal affairs of the other State.

ARTICLE 6

The present Treaty will be valid for twenty years from the date of its signing. If at the end of this twenty-year term neither of the high contracting parties gives notice, one year before the expiration of this term, of its desire to terminate the Treaty, it shall remain valid for a further five years, and so on, until either of the high contracting parties gives notice in writing, one year before the expiration of the then current five-year term, of its intention to terminate the operation of the Treaty.

The present Treaty comes into force immediately upon its signing and is subject to ratification within the shortest possible time. The exchange of ratification instruments will take place in Sofia in the near future.

In testimony whereof the plenipotentiary representatives have signed the present Treaty and affixed their seals to it.

Made in Moscow on March 18, 1948, in two copies each in the Russian and Bulgarian languages, both texts having equal force.

(Signed)

On authorisation of the Presidium of the Supreme Soviet of the U.S.S.R.,

V. M. MOLOTOV;

On authorisation of the Presidium of the Grand National Assembly of the Bulgarian People's Republic,

G. DIMITROFF.

3

TREATY BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM AND THE PROVISIONAL GOVERNMENT OF BURMA REGARDING THE RECOGNITION OF BURMESE INDEPENDENCE AND RELATED MATTERS

London, October 17, 1947

The Government of the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of Burma;

Considering that it is the intention of the Government of the United Kingdom of Great Britain and Northern Ireland to invite Parliament to pass legislation at an early date providing that Burma shall become an independent State;

Desiring to define their future relations as the Governments of independent States on the terms of complete freedom, equality and independence and to consolidate and perpetuate the cordial friendship and good understanding which subsist between them; and

Desiring also to provide for certain matters arising from the forthcoming change in relations between them,

Have decided to conclude a treaty for this purpose and have appointed as their plenipotentiaries:—

The Government of the United Kingdom of Great Britain and Northern Ireland:

The Right Hon. Clement Richard Attlee, C.H., M.P., Prime Minister and First Lord of the Treasury.

The Provisional Government of Burma:

The Honourable Thakin Nu, Prime Minister.

Who have agreed as follows:—

Article 1

The Government of the United Kingdom recognise the Republic of the Union of Burma as a fully independent sovereign State.

The contracting Governments agree to the exchange of diplomatic representatives duly accredited.

Article 2

All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Burma, devolve upon the Provisional Government of Burma. The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Burma shall henceforth be enjoyed by the Provisional Government of Burma.

ARTICLE 3

Any person who at the date of the coming into force of the present Treaty is, by virtue of the Constitution of the Union of Burma, a citizen thereof and who is, or by virtue of a subsequent election is deemed to be, also a British subject, may make a declaration of alienage in the manner prescribed by the law of the Union, and thereupon shall cease to be a citizen of the Union.

The Provisional Government of Burma undertake to introduce in the Parliament of the Union as early as possible, and in any case within a period of one year from the coming into force of the present Treaty, legislation for the purpose of implementing the provisions of this Article.

ARTICLE 4

The relations of the contracting Governments in the sphere of Defence shall be regulated by the Agreement concluded between them on August 29, 1947, the provisions of which are set out in the Annex hereto and which shall have force and effect as integral parts of the present Treaty.

ARTICLE 5

The Provisional Government of Burma reaffirm their obligation to pay to British subjects domiciled on the date of the coming into force of the present Treaty in any country other than India and Pakistan all pensions, proportionate pensions, gratuities, family pension fund and provident fund payments and contributions, leave salaries and other sums payable to them from the revenues of Burma or other funds under the control of the executive authority of Burma, in virtue of all periods of service prior to that date under the rules applicable immediately prior thereto.

ARTICLE 6

The contracting Governments agree that the following provisions shall constitute a final settlement of the financial questions dealt with in this Article :—

1. The Provisional Government of Burma reaffirm their agreement to pay over in full proceeds of the sale of Army (including Civil Affairs Service (Burma)) stores. The Government of the United Kingdom agree to make no claim on the Provisional Government of Burma for repayment of the cost of the Civil Affairs Administration prior to the restoration of civil government.

2. The Government of the United Kingdom agree to cancel £15 million of the sums advanced towards the deficits on the Ordinary Budget and the Frontier Areas Budget. The balance of the sums will be repaid by Burma in twenty equal yearly instalments beginning not later than April 1, 1952, no interest being chargeable. The cancellation of this amount of Burma's indebtedness is accepted by the Provisional Government of Burma as a

further contribution by the Government of the United Kingdom towards the restoration of Burma's financial position and as a final liquidation of their claim in respect of the cost of supplies and services furnished to the British Military Administration in Burma.

3. The Provisional Government of Burma agree to repay in full the sums advanced by the Government of the United Kingdom towards expenditure on Projects (including Public Utilities, etc.). In accordance with existing agreements, repayment will continue to be made from current receipts in excess of necessary outgoings and working capital and from the proceeds of liquidation, and the balance of advances outstanding will be repaid by the Provisional Government of Burma in twenty equal yearly instalments beginning not later than April 1, 1952, no interest being chargeable.

4. The Government of the United Kingdom agree to continue to reimburse the Provisional Government of Burma for expenditure in respect of—

(*a*) claims for supplies and services rendered to the Burma Army in the Burma campaign of 1942; and

(*b*) release benefits payable on demobilisation to Burma Army personnel for war service.

5. Except in so far as they are specifically modified or superseded by the terms of this Agreement and of the Defence Agreement of August 29, 1947, the provisions of the Financial Agreement of April 30, 1947,[1] between the Government of the United Kingdom and the Government of Burma remain in force.

Article 7

(*a*) All contracts other than contracts for personal service made in the exercise of the executive authority of Burma before the coming into force of the Constitution of the Union of Burma to which any person being a British subject domiciled in the United Kingdom or any Company, wherever registered, which is mainly owned, or which is managed and controlled by British subjects so domiciled, was a party, or under which any such person or company was entitled to any right or benefit, shall as from that date, have effect as if made by the Provisional Government of Burma as constituted on and from that date; and all obligations that were binding on the Provisional Government of Burma immediately prior to the said date, and all liabilities, contractual or otherwise, to which that Government was then subject, shall, in so far as any person or company as aforesaid is interested, devolve on the Provisional Government of Burma as so constituted.

(*b*) In so far as any property, or any interest in any property vested in any person or authority in Burma before the coming into force of the Constitution of the Union of Burma, or the benefit of any contract entered into by any such person or authority before

[1] *Hansard*, May 22, 1947, Cols. 276–7.

that date, is thereafter transferred to, or vested in the Provisional or any successor Government of Burma, it shall be so transferred or vested subject to such rights as may previously have been created and still subsist therein, or in respect thereof, in favour of any person or company of the status or character described in the preceding sub-article.

ARTICLE 8

The contracting Governments being resolved to conclude at the earliest possible date a mutually satisfactory Treaty of Commerce and Navigation have agreed for a period of two years from the date of the coming into force of the present Treaty or until the conclusion of such a Treaty of Commerce and Navigation to conduct their commercial relations in the spirit of Nos. 1–3 of the Exchange of Notes annexed hereto, provided that, at any time after six months from the date of the coming into force of the present Treaty, either party may give three months' notice to terminate the undertaking set out therein.

ARTICLE 9

The contracting Governments agree to maintain postal services, including Air Mail services and Money Order services, on the existing basis, subject to any alteration in matters of detail which may be arranged between their respective Postal Administrations as occasion may arise.

ARTICLE 10

The Provisional Government of Burma agree to negotiate Treaty arrangements in respect of the care and upkeep of war cemeteries and/or war graves of the British Commonwealth and Empire in Burma with the Governments represented on the Imperial War Graves Commission and, pending negotiation of such arrangements, to recognise the Imperial War Graves Commission as the sole authority responsible for dealing with such war cemeteries and/or war graves and to accord to the Commission the privileges set out in Nos. 4 and 5 of the Exchange of Notes annexed to the present Treaty.

ARTICLE 11

The contracting Governments will accord to each other the same treatment in civil aviation matters as heretofore, pending the conclusion of an Agreement in regard to them, provided that this arrangement may be terminated on six months' notice given by either side.

ARTICLE 12

The contracting Governments agree to conclude at the earliest possible date an agreement for the avoidance of double taxation.

Article 13

Nothing in the present Treaty is intended to or shall in any way prejudice the rights and obligations which devolve or may devolve upon either of the contracting parties under the Charter of the United Nations or from any special agreements concluded in virtue of Article 43 of the Charter.

Article 14

Should any difference arise relative to the application or the interpretation of the present Treaty, and should the contracting parties fail to settle such difference by direct negotiations, the difference shall be referred to the International Court of Justice unless the parties agree to another mode of settlement.

Article 15

The present Treaty shall be ratified and shall come into force immediately upon the exchange of Instruments of Ratification, which shall take place on the day on which Burma becomes independent in accordance with the appropriate legislation to be introduced in the United Kingdom for that purpose.

In witness whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their Seals.

Done in duplicate in London this 17th day of October, 1947.

(L.S.) CLEMENT RICHARD ATTLEE.
(L.S.) THAKIN NU.

4

EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE POLISH REPUBLIC CONCERNING COMPENSATION FOR BRITISH INTERESTS AFFECTED BY THE POLISH NATIONALISATION LAW OF JANUARY 3, 1946

Warsaw, January 24, 1948

No. 1

His Majesty's Ambassador at Warsaw to the Polish Minister for Foreign Affairs

Your Excellency, *January* 24, 1948

In accordance with instructions from His Majesty's Principal Secretary of State for Foreign Affairs, I have the honour to inform you that His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland have examined the Minute

concerning compensation for British interests affected by the Polish law of January 3, 1946, regarding the taking over by the State of the basic branches of the national economy, and the Annex thereto, which were signed on October 31, 1947, by representatives of the Governments of the United Kingdom and Poland. Copies of the Minute and Annex thereto are attached to the present Note.

2. His Majesty's Government in the United Kingdom confirm the Minute and the Annex as set forth in the texts attached thereto.

I avail, etc.,

(Sgd.) D. ST. CLAIR GAINER.

MINUTE CONCERNING COMPENSATION FOR BRITISH INTERESTS AFFECTED BY THE POLISH LAW OF JANUARY 3, 1946, REGARDING THE TAKING OVER BY THE STATE OF THE BASIC BRANCHES OF THE NATIONAL ECONOMY [1]

I.—DEFINITIONS

1. For the purposes of the present Minute, the following definitions shall apply :—

(*a*) 'British subjects' shall mean all British subjects and British-protected persons belonging to the United Kingdom or to any colonies, overseas territories, or protected or mandated territories of the United Kingdom.

(*b*) 'British claimants' shall mean all physical persons who were British subjects on January 3, 1946 (and their heirs and legal representatives), and all companies and firms constituted before January 3, 1946, under the laws of the United Kingdom or of any of the territories specified in (*a*) above, who—

(i) on January 3, 1946, owned or were shareholders in a company which owned an undertaking affected by the Nationalisation Law (hereinafter referred to as 'British owners and shareholders');

(ii) on September 1, 1939, had (whether directly or through a nominee) a financial claim against the owner of an undertaking affected by the Nationalisation Law or a financial claim secured on or legally enforceable against any undertaking so affected (hereinafter referred to as 'British creditors'); or

(iii) on January 3, 1946, had any rights, not included in sub-paragraphs (i) and (ii) above, against the owner of an undertaking affected by the Nationalisation Law.

[1] Note.—*Journal of Laws*, No. 3 of February 5, 1946, Item 17.

Where provision is made by paragraph 10 of the present Minute for the grant of compensation to British owners and shareholders with respect to interests held indirectly or through the medium of subsidiary companies, the provisions of the present minute will apply to them as though they were included within the definition of 'British owners and shareholders' set forth in this sub-paragraph.

(*c*) 'Poland' shall mean the territories which at the date of signature of the present Minute are under the administration of the Polish Government.

2. The grant of compensation, in accordance with the provisions of the present Minute, to any British claimant who became a British subject after September 1, 1939, shall in each case be subject to prior study in the United Kingdom-Polish Mixed Commission mentioned in paragraph 25 below (hereinafter referred to as 'the Mixed Commision').

II.—General Principles of Compensation

3. Compensation to British owners and shareholders under article 7 of the Polish Law of January 3, 1946, regarding the taking over by the State of the basic branches of the national economy (herein, both in the present Minute and in the Annex thereto, referred to as 'the Nationalisation Law') shall be so assessed as to be adequate and so paid as to be effective. Compensation to other British claimants shall be assessed and paid in accordance with the same principle.

4. Any proposals by individual British claimants for the settlement of compensation claims or for exemption from nationalisation as part of or in connexion with new trading arrangements will be sympathetically considered by the competent Polish authorities.

5. Except in cases where any special arrangement may be agreed between the Polish authorities and any individual British claimant, compensation, operative from the date of nationalisation, shall be payable in compensation securities issued by the Polish Government.

6. Compensation securities shall be divided into two classes :—

(*a*) Negotiable sterling securities expressed and payable in sterling to be delivered to the claimant in the United Kingdom; and

(*b*) Zloty securities fully negotiable and marketable in Poland, expressed and payable in zlote.

7. The Polish Government undertake to provide sterling at due dates, in accordance with the service plan mentioned in paragraph 8 below, to meet the service of the sterling securities referred to in paragraph 6 (*a*) above.

8. The Government of the United Kingdom and the Polish Government agree that the provisions of the service plan for

compensation securities shall be the subject of later discussion in the Mixed Commission. The Government of the United Kingdom agree for their part that, when the service plan for compensation securities is being drawn up, account shall be taken of the progress of Polish economic recovery and the prospective Polish balance of payments.

9. Compensation securities shall be free of all Polish taxes and duties now existing or imposed hereafter.

III.—Principles of Compensation to British Owners and Shareholders

10.—(*a*) The Polish Government will grant compensation to British owners and shareholders to the extent of their interests as owners of, or as shareholders in companies which owned, any of the following undertakings :—

(i) Undertakings nationalised under article 3 of the Nationalisation Law; or

(ii) Undertakings nationalised under article 2 of the Nationalisation Law owned by companies having their legal seat in Poland.

(*b*) The Polish Government will grant compensation to British owners and shareholders to the extent of their interests as owners of, or as shareholders in companies which owned, undertakings nationalised under article 2 of the Nationalisation Law owned by companies having their legal seat within the present administrative boundaries of Germany, if—

(i) the combined shareholding of United Nations nationals, whether held directly or indirectly, including holding through the medium of subsidiary companies, amounts to 90 per cent. or more of the total shareholding in the company; or

(ii) although such combined shareholding is less than 90 per cent., substantially the whole assets of the company were, on September 1, 1939, located in Poland.

(*c*) The Polish Government will also grant compensation to British owners and shareholders to the extent of their interests, in companies which owned undertakings mentioned in sub-paragraph (*a*) of this paragraph, held indirectly through companies having their legal seat within the present administrative boundaries of Germany, if—

(i) the combined shareholding of United Nations nationals, whether held directly or indirectly, including holding through the medium of subsidiary companies, amounts to 90 per cent. or more of the total shareholding in the company which owned the undertaking; or

(ii) although such combined shareholding is less than 90 per

cent., substantially the whole assets of the company were, on September 1, 1939, located in Poland.

(*d*) The Polish Government will also grant compensation to British owners and shareholders to the extent of their interests held indirectly through United Nations nationals, whether such nationals are physical or legal persons, including subsidiary companies, unless there is an agreement between the Polish Government and the Government of a country other than the United Kingdom providing compensation for such interests, in which case such agreement will apply.

11. No compensation will be paid by the Polish Government in respect of British interests in an undertaking nationalised under article 2 of the Nationalisation Law if, at any time since January 30, 1933, the undertaking has been primarily engaged in the production of arms, ammunition, or equipment designed solely for warlike purposes, unless the use of the undertaking for such production was the result of unilateral action by the German authorities.

12. Compensation awarded to British owners and shareholders in accordance with the provisions of paragraph 10 (*a*) (ii) and (*b*) above shall be paid to them direct.

13.—(*a*) Sterling securities will be issued to British owners or shareholders where there has been an investment of capital as defined in this paragraph, by the British owner or shareholder or his predecessor in title, in respect of an undertaking which has been nationalised, subject to the proviso that where his predecessor in title was a German national the transfer of title took place before September 1, 1939.

(*b*) The ratio of compensation payable in sterling securities to that payable in zloty securities will be related to the ratio of capital investment, as defined in this paragraph, to other investments, but due regard will be paid to the circumstances of individual cases.

(*c*) For the purposes of the present Minute, 'investment of capital' shall mean :—

(i) Investments made by transferring sterling to Poland.

(ii) Investments made by transferring other currency to Poland at a time when such currency was convertible into sterling.

(iii) Accumulation or re-investment in Poland of undistributed profits in zlote at a time when the zloty was convertible into sterling.

(iv) Introduction into the undertaking of any items of property which may be agreed to constitute an investment of capital.

(v) Rendering, in pursuance of a contractual obligation, of any substantial technical or economic assistance or other services which, after discussion by the Mixed Commission, may be agreed to constitute an investment of capital.

14. So far as compensation to British owners and shareholders is not paid in sterling securities, it will be paid in zloty securities.

IV.—PRINCIPLES OF COMPENSATION TO BRITISH CREDITORS

15. Where the financial claims of British creditors lie against the owners of undertakings nationalised under Article 3 of the Nationalisation Law, the Polish Government agree that the discharge of such claims shall be a prior charge on the compensation payable to the debtors, due regard being paid to the priorities of creditors as between themselves in accordance with their contractual rights under Polish law. Such prior charge shall entitle the British creditor to receive satisfaction of his debt in the form of compensation securities.

16.—(*a*) Where the financial claims of British creditors lie against the owners of undertakings nationalised under article 2 of the Nationalisation Law, the Polish Government will grant compensation to British creditors whose claims—

(i) Are or, immediately prior to nationalisation, were secured on, whether by debenture, bond, mortgage or otherwise, or legally enforceable against such undertakings, provided that no compensation will be granted if the debtor is a company having its legal seat within the present administrative boundaries of Germany unless substantially the whole assets of the company are located in Poland; or

(ii) are in respect of sums which constituted or resulted in an investment of capital within the meaning of paragraph 13 (*c*) above.

(*b*) The Polish Government will take such steps as may be necessary to enable such British creditors to be recognised as having claims against undertakings nationalised under article 2 of the Nationalisation Law and will make arrangements to enable them to secure appropriate satisfaction of their claims. The Polish Government will communicate to the Government of the United Kingdom through the Mixed Commission the arrangements they propose for this purpose.

(*c*) Compensation for British creditors' claims under this paragraph shall not exceed the sum which would be payable to the British creditors, in accordance with the provisions of the present Minute, if compensation for the nationalised undertaking were payable to the owner of the undertaking.

(*d*) Compensation awarded to British creditors under this paragraph shall be paid to them direct.

17.—(*a*) Sterling securities will be issued to British creditors where sums, in respect of which they have financial claims, constituted or resulted in an investment of capital within the meaning of paragraph 13 (*c*) above.

(*b*) Zloty securities will be issued to British creditors in respect

of financial claims other than those included in sub-paragraph (*a*) of this paragraph.

18.—(*a*) Where zloty securities are issued in respect of financial claims repayable by contract in sterling or in other foreign currency which was convertible into sterling at the time when the debt was incurred, the nominal zloty value of the securities at the date of issue will be equivalent to the sum in sterling which would have been payable if compensation had been paid in sterling.

(*b*) In calculating the nominal value of these securities the rate of exchange applicable shall be the par value of the zloty established under the articles of the International Monetary Fund. In the event of such par value not having been so established at the date of issue of the securities, the rate of exchange applicable shall be the Warsaw official par value in force at that date.

(*c*) The Polish Government undertake to allow transfer across the exchanges of service payments on the zloty securities mentioned in sub-paragraph (*a*) of this paragraph as soon as the economic circumstances of Poland permit.

(*d*) If, after the date of issue of the securities, the par value of the zloty, referred to in sub-paragraph (*b*) of this paragraph, varies in relation to the pound sterling by more than 10 per cent. in either direction, the Government of the United Kingdom and the Polish Government will consult together with a view to reaching a practical and equitable solution.

(*e*) Nothing in the above provisions of this paragraph shall prejudice the right of British creditors to submit proposals for the settlement in sterling of the financial claims mentioned in sub-paragraph (*a*) of this paragraph. Such proposals will be sympathetically considered by the competent Polish authorities.

V.—Principles of Compensation to British Claimants as defined in Paragraph 1 (*b*) (iii)

19. The Polish Government will grant compensation to British claimants as defined in paragraph 1 (*b*) (iii) above in accordance with the principles set forth in Parts II and III of the present Minute, but the application of these principles in the case of such British claimants shall be the subject of discussion in the Mixed Commission.

VI.—General Provisions

20. In applying the provisions of the Nationalisation Law, in relation to copyright and industrial property, such as patent rights, trade names and trade marks, the Polish Government will observe the international conventions and agreements regarding copyright and industrial property.

21.—(*a*) If between September 1, 1939, and May 8, 1945, the rights or interests of British claimants in nationalised undertakings

were affected by unilateral action on the part of German citizens or authorities, they shall have the right, within twelve months after the date of removal of the obstacles to the initiation of such proceedings, to initiate legal proceedings before the appropriate Polish court or other authority for the purpose of obtaining restoration of the position existing before that action.

(*b*) If the detriment to the rights or interests of a British claimant in a nationalised undertaking has been the result of a formal act in law, executed in circumstances in which the legal consequences of that act can be avoided under Polish law, the British claimant shall have the right, within twelve months after the removal of the obstacles to the initiation of such proceedings, to initiate legal proceedings before the appropriate Polish court or other authority for the purpose of obtaining cancellation of such formal act.

(*c*) For the purposes of sub-paragraphs (*a*) and (*b*) of this paragraph, the 'date of removal of the obstacles' shall mean the date of signature of the present Minute.

(*d*) Notwithstanding the provisions of sub-paragraphs (*a*) and (*b*) of this paragraph, the Polish court or other authority may refuse to entertain such proceedings unless the British claimant can prove that he was in fact unable to initiate such proceedings within the time-limit allowed under Polish law.

22.—(*a*) So soon as any British owner or shareholder has shown that he is a *bona fide* claimant, such British owner or shareholder, or his authorised representative, will be afforded, through the competent Polish authorities, all necessary facilities to present and prosecute his claim for compensation.

(*b*) The necessary facilities will include the right—

(i) To visit nationalised undertakings;

(ii) To obtain such information regarding the condition and value of nationalised undertakings as may reasonably be required for the presentation and prosecution of claims to compensation; and

(iii) To participate in preparing detailed inventories of the elements of property of nationalised undertakings and to submit comments and explanations on the relevant protocols of delivery and receipt.

(*c*) Minority shareholders shall only have such facilities as they would have had by law, contract or custom if the undertaking had not been nationalised. If difficulties should arise regarding the provision of such facilities for minority shareholders, the Polish Government will give favourable consideration to any representations which the Government of the United Kingdom may make in this respect through the medium of the Mixed Commission.

(*d*) The circumstances in which facilities, similar to those mentioned in sub-paragraphs (*a*) and (*b*) of this paragraph, will be

afforded to British creditors will be agreed through the medium of the Mixed Commission.

(*e*) The competent authorities in Poland and the United Kingdom will use their best endeavours to ensure that the facilities mentioned in this paragraph are made available and utilised with the minimum of delay.

23. The Polish Government confirm that they desire to settle questions of compensation to British claimants with the least possible delay and the least possible expense to the claimants and undertake to communicate to His Britannic Majesty's Embassy in Warsaw the provisions to be adopted for this purpose.

24. As set forth in an exchange of letters made on this day's date between the signatories of the present Minute, the Polish Government will make the necessary arrangements for British claims to be concentrated in a Special Panel of the Compensation Commission to be set up in accordance with article 7 of the Nationalisation Law.

25. The Government of the United Kingdom and the Polish Government agree to the establishment of a Mixed Commission with terms of reference as set forth in the annex to the present Minute.

26.—(*a*) If the Government of the United Kingdom consider that, having regard to all the circumstances of the case, the compensation awarded to any British claimant is inadequate, the question will be reconsidered between the two Governments with a view to a mutually satisfactory settlement. In default of agreement, the question shall, at the request of either Government, be referred for settlement to a Committee of Arbitration consisting of three members. One member shall be appointed by the Government of the United Kingdom, one member shall be appointed by the Polish Government, and the third, who shall not be either a British subject or a Polish citizen, shall be co-opted by agreement between the first two members.

(*b*) The Committee of Arbitration shall settle any such question, by majority vote, in accordance with the provisions of the present Minute.

27. The provisions contained in the present Minute will come into force on confirmation by the Government of the United Kingdom and the Polish Government.

28. The present Minute is done in duplicate, in English and in Polish, both texts being equally authentic.

For His Majesty's Government in the United Kingdom:
PHILIP BROAD.

For the Government of the Republic of Poland:
L. KUROWSKI.

Warsaw, October 31, 1947.

ANNEX

Terms of Reference of the United Kingdom—Polish Mixed Commission

A.—*General Provisions*

1. A United Kingdom—Polish Mixed Commission (hereinafter referred to as 'the Mixed Commission') is hereby established to perform the functions set forth in Part B of this annex. The Mixed Commission shall serve as the normal channel of communication between the Government of the United Kingdom and the Polish Government on any matter affecting British claimants arising out of the Nationalisation Law.

2. Within thirty days after the date of confirmation by the Government of the United Kingdom and the Polish Government of the Minute to which the present terms of reference form an annex, each Government shall appoint two permanent commissioners and shall communicate their names to the other Government. Either Government, upon giving notice to the other Government, shall be entitled at any time to appoint additional temporary commissioners.

3. Irrespective of their numbers, the United Kingdom Commissioners shall together be entitled to one vote and the Polish Commissioners shall together be entitled to one vote.

4. Two United Kingdom Commissioners and two Polish Commissioners shall together constitute a quorum of the Mixed Commission.

5. The Mixed Commission shall meet on such dates and for such periods as may be proposed by the permanent commissioners of either Government. Consent to such proposals shall not unreasonably be withheld.

6. In all respects other than as stated above, the Mixed Commission shall draw up its own rules of procedure.

B.—*Functions.*

7. The functions of the Mixed Commission shall be :—

(*a*) To discuss general questions of compensation to British claimants affected by the Nationalisation Law, including matters of procedure.

(*b*) To formulate proposals for standards, rules and formulæ for the assessment of compensation in implementation of article 7 of the Nationalisation Law.

(*c*) To discuss the method of payment and questions of transfer of compensation to British claimants with particular reference to the service plan for compensation securities.

(*d*) To discuss the application of—

(i) the Minute mentioned in paragraph 2 of this annex;

(ii) the two letters exchanged on this day's date between the signatories of the Minute mentioned in paragraph 2 of this annex; and

(iii) any other letters, minutes or documents agreed between the Government of the United Kingdom and the Polish Government regarding compensation to British claimants affected by the Nationalisation Law.

(*e*) At the request of either Government, to endeavour to resolve any differences between the two Governments in respect of the interpretation or application of the Minute mentioned in paragraph 2 of this annex that may arise out of any individual case.

(*f*) Such other functions as may from time to time be conferred upon the Mixed Commission by agreement between the Government of the United Kingdom and the Polish Government.

8. The Mixed Commission may make recommendations on any matter within its functions to the Government of the United Kingdom and to the Polish Government. Both Governments will give favourable consideration to and endeavour to give effect to such recommendations.

9. In formulating the order provided for in article 7 (6) of the Nationalisation Law, the Polish Council of Ministers will seek to embody any proposals regarding standards, rules and formulæ for the assessment of compensation drawn up by the Mixed Commission. In promulgating supplementary orders, they will similarly seek to embody any additional proposals regarding standards, rules and formulæ drawn up by the Mixed Commission.

[Initials]

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